

2960 No. 15022

United States
Court of Appeals
for the Ninth Circuit

J. P. TONKOFF, individually and as trustee,
Appellant,

vs.

CLAY BARR and BETTY BARR, husband and
wife, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 272, inclusive)

Appeal from the United States District Court for the
District of Oregon.

FILED

APR 30 1956

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellees.

In the United States District Court for the
District of Oregon

Civil No. 7378

J. P. TONKOFF, Individually, and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and
wife, and KERR-GIFFORD CO., a corpora-
tion, Defendants.

COMPLAINT

Plaintiff complains of the defendants and alleges:

1. That the plaintiff, J. P. Tonkoff, as well as the beneficiaries E. J. Welch and Viola Welch, are residents of the State of Washington. That the beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are all residents of the State of Idaho; that the defendants Clay Barr and Betty Barr are residents of the State of Oregon and Kerr-Gifford Co., a corporation, is a corporation incorporated either in the State of Oregon or some state other than the State of Washington. That by reason of the foregoing residences there is a diversity of citizenship between the plaintiffs and the beneficiaries and the defendants, Clay Barr and Betty Barr and Kerr-Gifford Co., a corpora-

tion; that the amount in controversy exceeds the sum of \$3,000.00.

2. That at all times mentioned herein plaintiff, J. P. Tonkoff, was and now is one of the named trustees in the certain Declaration of Trust executed on the 10th day of June, 1953 at Spokane, Washington, which is marked Exhibit "A" and hereto attached and by reference made a part of this paragraph as though fully set forth. That Horton Herman, one of the trustees named in said Declaration of Trust has resigned as trustee, a copy of said resignation marked Exhibit "B" is hereto attached and by reference made a part of this paragraph as though fully set forth.

3. That the plaintiff, J. P. Tonkoff, has a personal interest separate and apart from his capacity as Trustee in the crop and proceeds named in said Declaration of Trust, as appears in said instrument hereto attached and marked Exhibit "A".

4. That at the time of the execution of the Declaration of Trust, Exhibit "A", the defendants, Clay Barr and Betty Barr, were operating the property located in Siskiyou County, California, known as the Meiss ranch, under a lease dated the 7th day of May, 1953, which lease named Frank Hofues and Dorothy Hofues, husband and wife, and Albert G. Kirschmer and Virginia Kirschmer, husband and wife, as lessors and defendants, Clay Barr and Betty Barr, as lessees, and at which time the crops growing upon said property were in a good condition.

5. At the time of said Declaration of Trust, Ex-

hibit "A" the defendants, Clay Barr and Betty Barr, warranted that there were approximately 2,800 acres of crops growing, when in truth and in fact said warranty was false and untrue, and that there were crops planted and growing in the following amounts:

Oats	1,086 acres
Wheat	132 acres
Barley	1,200 acres
Rye	250 acres

Total2,668 acres

6. That the defendants, Clay Barr and Betty Barr, husband and wife, refused, failed and neglected to perform in accordance with the terms and conditions of their assignment, which provides that said defendants would farm said property in a good and farmerlike fashion, in that:

(a) That said defendants failed, refused and neglected to properly or at all spray the growing crops during the growing season in order to destroy the noxious weeds which had infested the land and crops, when in the exercise of ordinary care and the custom in the locality required said defendants to spray said crops with a spray to destroy the noxious weeds, so that as a consequence thereof crops growing on 446 acres could not and were not harvested by said defendants.

(b) That the said defendants failed, refused and neglected to irrigate said crops in a good farmerlike manner so that as a consequence thereof a large

quantity of the crops were either totally destroyed or unable to ripen and develop, so they could be harvested.

(c) That the said defendants during the first part of August plowed under 120 acres of oats, without the consent, knowledge and authority of the Trustees or Beneficiaries named in Exhibit "A".

(d) That the said defendants failed, refused and neglected to harvest the crops in a good and farmer-like fashion, in that the harvesting was performed in such a manner in operating the harvesting machines at so fast a speed and in such a manner that approximately ten per cent of the grain crops were either not harvested or wasted.

(e) That the said crops were conveyed from the Meiss ranch to Medoel, California in trucks which were inadequate and improper for the conveyance of said crops so approximately five per cent of the crops escaped over the tops and sides and bottoms of said trucks.

7. That had the defendants, Clay Barr and Betty Barr, husband and wife, cultivated, farmed and harvested the said property and crops named in Exhibit "A" in a good and farmerlike fashion, they would have produced and harvested:

Barley: 3,500 pounds per acre; value per hundred weight, \$3.00.

Rye: 1,200 pounds per acre; value per hundred weight, \$1.90.

Wheat: 1,500 pounds per acre; value per hundred weight, \$3.10.

Oats: 4,000 pounds per acre; value per hundred weight, \$2.30.

Which crops would have been valued and would have brought on the market in excess of \$250,000.00, \$125,000.00 of which would have been available to pay plaintiff and his beneficiaries the sum of \$72,500.00.

8. That the defendant, Kerr-Gifford Co., is a corporation doing business in California and Oregon and is engaged in the business of buying and selling of grains of various kinds.

9. That the defendants, Clay Barr and Betty Barr, husband and wife, harvested and sold all of the crops described in Exhibit "A" to the defendant Kerr-Gifford Co., a corporation, for the approximate sum of \$70,000.00 (one-half of said sum being payable to parties other than plaintiff and the beneficiaries). That the monetary proceeds from said crops are being retained by the defendant, Kerr-Gifford Co. and that the said defendant, Kerr-Gifford Co., refuses to give up any portion of said proceeds notwithstanding the fact that said Kerr-Gifford Company was advised and knew that the plaintiff, J. P. Tonkoff was and now is the owner of said crop as an individual and as trustee in accordance with the terms and conditions and provisions of Exhibit "A" attached hereto and as amended by Exhibit "B" attached hereto.

Wherefore, Plaintiff prays for:

1. Judgment against the defendant, Kerr-Gifford

Co., a corporation, in the sum of \$35,000.00 or for 50% of the proceeds from said crops, whichever is the greater sum, with interest at the rate of six per cent per annum from the 15th day of November, 1953, until paid.

2. For the sum of \$72,500.00 from the defendants, Clay Barr and Betty Barr, with interest at the rate of six per cent per annum from the 15th day of November, 1953, less such sum as may be paid to plaintiff individually and in his capacity as Trustee by Kerr-Gifford Co., a corporation, by virtue of this proceeding.

3. For plaintiff's costs and disbursements herein incurred.

/s/ VIRGIL COLOMBO,
Of Attorneys for Plaintiffs

EXHIBIT "A"

DECLARATION OF TRUST

Whereas, the undersigned, J. P. Tonkoff and Horton Herman, are the assignees named in that certain written Assignment, dated June 10, 1953, executed by Clay Barr and Betty Barr, his wife, as assignors, which assignment is in words and figures as follows, to-wit:

"Assignment

This Agreement Made and entered into this 10th day of June, 1953, by and between Clay Barr and Betty Barr, his wife, hereinafter called Assignors,

and J. P. Tonkoff and Horton Herman, hereinafter called Assignees.

Whereas, the above named Assignees are the attorneys respectively for E. J. Welch and Viola A. Welch, his wife, and Clay Barr and Betty Barr, his wife; and said parties being involved in a civil action for damages, and;

Whereas, Roland P. Charpentier and Effie G. Charpentier, his wife, being represented by John W. Cramer of Lewiston, Idaho, are judgment creditors of E. J. Welch and wife, and;

Now, Therefore, it is mutually agreed as follows:

1. The Assignors do hereby assign to the assignees for the benefit of the Assignees and Roland P. Charpentier and his wife and E. J. Welch and Viola Welch, his wife, and John W. Cramer all of their right, title and interest in and to the growing crops to be harvested in 1953 on that certain property located in Siskiyou County, California, and known as the Miess Ranch, which ranch is in the possession of the Assignors as Lessees under that certain lease dated May 7, 1953, by and between Frank Hofues and Dorothy Hofues, his wife, and Albert G. Kirschmer and Virginia Kirschmer, his wife, as Lessors, subject, however, to the following provisions:

a. The Assignors agree to harvest said crops without interference from the Assignees and/or the persons for whom they are taking this assignment,

and shall retain out of the Lessees' interest in said crop the sum of Fifteen Thousand Dollars (\$15,000.00) to over their cost of harvesting.

b. The Assignors herein agree upon the harvest of said assigned crop to deposit the same at their expense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the Assignees. It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of Seventy-two Thousand Five Hundred Dollars (\$72,500.00) net to the Assignees; and the Assignees shall upon the receipt of said sum endorse and deliver over to the Assignors all warehouse receipts, if any, representing any of said crops not so sold.

c. The Assignors agree to notify the Assignees in writing of the commencement of harvesting at least ten (10) days before said harvest, said notice to be addressed to J. P. Tonkoff, 616 Miller Building, Yakima, Washington, and Horton Herman, 215 Paulsen Building, Spokane, Washington.

The execution and delivery of this assignment by the Assignors to the Assignees is made and accepted in full settlement of all claims, demands, actions and causes of action of any and every kind and nature in any way arising out of or pertaining to the subject matter of that certain law suit No. 135666 now pending in the Superior Court in and for the County of Spokane, State of Washington, wherein the said Welchs are named as plaintiffs and the Assignors herein and Sterling Higgins are named

as defendants; and all claims of every kind and nature against the said Clay Barr and wife in any manner arising out of the sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho.

The Assignors, Clay Barr and Betty Barr, his wife, warrant that they are the owners of a fifty per cent (50%) interest in the crop growing on the above described property; and warrant that there is planted to crop on the above described farm property approximately Twenty-eight Hundred (2800) acres; and that the Assignors' interest in said crop is free and clear from any encumbrance.

The Assignors herein agree to farm said lands in a good and farmer-like fashion and in accordance with the terms of the aforementioned lease, it being understood and agreed that the Assignors are not guaranteeing any particular yield, and shall not be liable for crop failure due to any cause beyond the control of the Assignors.

In Witness Whereof, the parties to the within instrument have executed the same the day and year first above written.

CLAY BARR
BETTY BARR

Assignors

J. P. TONKOFF
HORTON HERMAN

Assignees

and shall retain out of the Lessees' interest in said crop the sum of Fifteen Thousand Dollars (\$15,000.00) to over their cost of harvesting.

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as defendants; and all claims of every kind and nature against the said Clay Barr and wife in any manner arising out of the sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho.

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In Witness Whereof, the parties to the within instrument have executed the same the day and year first above written.

CLAY BARR
BETTY BARR

Assignors

J. P. TONKOFF
HORTON HERMAN

Assignees

State of Washington,
County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above-named county and state, do hereby certify that on this 10th day of June, 1953, personally appeared before me Clay Barr and Betty Barr, his wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

[Seal] MABEL JACKSON,
Notary Public in and for the State of Washington,
residing at Spokane.

Approved and Consented to by the following: E. J. Welch, Viola Welch, Roland P. Charpentier, Effie J. Charpentier, John W. Cramer.

And Whereas, it is the desire of the assignees to set forth in writing the terms and conditions under which they accepted and hold said assignment;

Now, Therefore, the following,

Declaration

I, the undersigned, J. P. Tonkoff and Horton Herman do hereby declare that they hold said assignment as Trustees for the use and benefit of themselves and for the use and benefit of the following named persons, to-wit: E. J. Welch and Viola A. Welch, his wife; Roland P. Charpentier

and Effie G. Charpentier, his wife, and John W. Cramer.

That the net proceeds of the sale of the crop referred to in said assignment are to be divided and paid as follows:

To J. P. Tonkoff	\$15,000.00
To Horton Herman	10,000.00
To E. J. Welch and Viola A. Welch, his wife	27,500.00
To Roland P. Charpentier and Effie G. Charpentier, his wife	15,000.00
John W. Cramer	5,000.00
	<hr/>
	\$72,500.00

It is understood and agreed that in the event the net proceeds of the sale of said crop referred to in the assignment that are received by the assignees does not equal \$72,500.00, then such lesser amount as is received by said assignees, who are the Trustees in this Declaration of Trust, shall be divided and paid to the above named parties on a pro rata basis in proportion that the amount each would receive if the net proceeds of sale equal \$72,500.00 bears to the amount of the actual net proceeds received.

It is specifically understood and agreed that the obligation of the undersigned, J. P. Tonkoff and Horton Herman, is confined solely to disbursement of funds in the manner aforesaid actually received by them pursuant to the terms of the aforementioned assignment.

Any assignment or other transfer by any of the beneficiaries named in this Declaration of Trust shall not be binding upon the undersigned Trustees, J. P. Tonkoff and Horton Herman, unless such assignment or transfer is in writing and an executed copy thereof filed with each of the named Trustees herein.

It is understood that each of the beneficiaries in this Declaration of Trust shall place his and her signature hereon, which shall ratify and confirm this document; shall constitute their approval hereof and their agreement to the division of funds in the manner hereinabove specifically set forth and, by so signing this document, the said E. J. Welch and Viola A. Welch, his wife, and Roland P. Charpentier and Effie G. Charpentier, his wife, and John W. Cramer do thereby reiterate and confirm the fact that, irrespective of the amount or amounts received by each of them pursuant to the terms of said assignment, the execution of such assignment hereinabove quoted and their approval and consent thereto, constitutes a full settlement of all claims, demands, actions and causes of action of any and every kind and nature that any of them had, have or may have against Clay Barr and Betty Barr, his wife, in any manner arising out of the purchase, sale, lease or operation of that certain property known as the Pair-A-Dice Club in the City of Lewiston, Idaho, or in any manner arising out of or pertaining to the subject matter of that certain lawsuit, No. 135666, in the Superior Court of the State of Washington, in and for the County of Spokane, wherein the said E. J. Welch is named as

plaintiff, and Clay Barr and Sterling Higgins are named as defendants.

Dated this 10th day of June, 1953.

/s/ J. P. TONKOFF

/s/ HORTON HERMAN

Trustees

The undersigned do hereby approve of and consent to and join in the foregoing Declaration of Trust. Signed: J. P. Tonkoff, Horton Herman, E. J. Welch, Viola Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer.

EXHIBIT "B"

Resignation

In accordance with the demand of E. J. Welch, Viola A. Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff, Beneficiaries under "Declaration of Trust" dated June 10, 1953 and J. P. Tonkoff, Trustee under said agreement, the undersigned, Horton Herman, does hereby resign from such trusteeship.

Dated this 26th day of January, 1954.

.....

Horton Herman

[Endorsed]: Filed February 8, 1954.

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now defendants Clay Barr and Betty Barr and move the court for an order dismissing the above entitled action for the following reasons:

(1) That the complaint fails to state a claim against these defendants upon which relief can be granted, in that:

(a) The complaint does not allege that the assignment quoted in the declaration of trust dated June 10, 1953, was in fact executed.

(b) The complaint does not show any breach of duty owing by these defendants to plaintiffs; and said assignment, if deemed to be sufficiently alleged, shows on its face that these defendants did not guarantee any particular yield.

(c) As to the sum of \$15,000 for cost of harvesting, referred to in said assignment (if said assignment be deemed sufficiently alleged), the complaint alleges no basis for claiming that said amount should be paid to plaintiffs, rather than to defendants Barr or their successors in interest, as provided in said assignment.

(d) The complaint does not show that plaintiffs have authority to bring this action on behalf of all beneficiaries of said trust.

(e) The complaint does not show any standing of plaintiff Tonkoff, as trustee, to maintain this action, in that said declaration of trust shows on its face that any obligation of the trustees is con-

ined solely to disbursement of funds actually received, and neither said assignment nor said trust instrument confers on the trustees or either of them any right or power to sue on behalf of the beneficiaries.

(2) That the complaint fails to join indispensable parties, in that:

(a) The complaint joins as plaintiffs some only of the beneficiaries under the declaration of trust dated June 10, 1953, and it does not join all of such beneficiaries but omits Horton Herman, or his successor in interest, who is a named beneficiary in said declaration of trust.

(b) In the alternative, if all of the beneficiaries are not indispensable parties, then both trustees would be indispensable parties, as joint obligees, and the complaint does not show that the purported resignation of Horton Herman as trustee was valid and effective, in that such resignation would be valid and effective only with the consent of all beneficiaries, and the complaint does not show that such consent was obtained from all beneficiaries.

(c) Even if Horton Herman's purported resignation as trustee is valid and effective, he is still one of the assignees named in said assignment and is therefore an indispensable party.

/s/ RANDALL B. KESTER,

Attorney for Defendants Clay Barr
and Betty Barr

Of Counsel:

Maguire, Shields, Morrison & Bailey.

State of Oregon,
County of Multnomah—ss.

This is to certify that the foregoing Motion is made in good faith, not for the purpose of delay, and that in my opinion the same is well founded in law.

/s/ RANDALL B. KESTER,
Attorney for Defendants Clay Barr
and Betty Barr

Acknowledgment of Service attached.

[Endorsed]: Filed February 19, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF MARCH 15, 1954

Plaintiffs appearing by Mr. Virgil Colombo, of counsel, and the defendants Clay Barr and Betty Barr by Mr. Randall B. Kester, of counsel. Whereupon, this cause comes on to be heard upon the motion of the defendants Clay Barr and Betty Barr for an order dismissing this cause, and the Court having heard the arguments of counsel,

It Is Ordered that said motion be, and is hereby, denied.

[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS
BARR

Come now defendants Clay Barr and Betty Barr, and for amended answer to plaintiff's complaint admit, deny and allege as follows, to wit:

First Defense

The complaint herein fails to state a claim against these defendants upon which relief can be granted.

Second Defense

These defendants:

(1) Admit that the residences of the parties are as stated in paragraph 1 of the complaint;

(2) Admit that plaintiff J. P. Tonkoff was and is one of the named trustees and also a beneficiary in the declaration of trust attached to the complaint;

(3) Admit that these defendants for a time operated the Meiss ranch in Siskiyou County, California, under a lease from Frank and Dorothy Hofues and Albert G. and Virginia Kirschmer;

(4) Admit paragraph 8 of the complaint, and that the crops referred to in said declaration of trust were sold to Kerr-Gifford Company, which still holds the proceeds thereof; and

(5) Deny all the remainder of said complaint and each and every part thereof.

Third Defense

1. On or about July 9, 1953, Horton Herman, named as a beneficiary in said declaration of trust, for value received, sold, assigned and transferred to Harvey S. Barr all of his right, title and interest as beneficiary thereunder, and all parties were duly notified of said assignment.

2. On or about October 12, 1953, these defendants, for value received, sold, assigned and transferred to A. G. Kirschmer the sum of \$15,000 which they were to receive from Kerr-Gifford Company from the proceeds of said crop under said declaration of trust, and all parties were duly notified of said assignment.

3. Said Harvey S. Barr, assignee of said Horton Herman, did not consent to the purported resignation of said Horton Herman as trustee under said declaration of trust, but refused to accept such resignation by reason whereof said purported resignation was and is invalid and of no effect.

4. The complaint herein fails to join indispensable parties, in that:

(a) It fails to join said Harvey S. Barr, assignee of the beneficial interest of Horton Herman;

(b) It fails to join Horton Herman who is still a co-trustee under said declaration of trust;

(c) It fails to join A. G. Kirschmer, assignee of defendant Clay Barr.

And for answer to the counterclaim of defendant, Kerr Gifford & Co. Inc. for interpleader, these defendants admit, deny and allege as follows, to wit:

First Defense

Said counterclaim fails to state a claim upon which interpleader can be granted.

Second Defense

These defendants admit paragraphs 1, 2, 3, 4 and 5 thereof, but deny paragraph 6 thereof, and particularly deny that defendant Kerr Gifford & Co. Inc. is entitled to an order of interpleader or to its costs or attorney fees from the proceeds of said grain crop now held by it.

Third Defense

Any demand by plaintiff, J. P. Tonkoff, individually or as trustee, for the sum of \$15,000 reserved to these defendants by said assignment of June 10, 1953, and thereafter assigned to said A. G. Kirschmer, is wholly sham and frivolous and without right or color of right, and gives no justification to defendant Kerr Gifford & Co. Inc. for refusing to pay said amount to said A. G. Kirschmer.

Fourth Defense

1. Said A. G. Kirschmer is a citizen and resident of the State of Texas; said Harvey S. Barr and Horton Herman are citizens and residents of the State of Washington; and the residences of the other parties are as stated in paragraph 1 of the complaint.

2. This court has no jurisdiction to grant inter-

pleader in this proceeding, for the reason that none of the claimants to the proceeds of said crop held by Kerr Gifford & Co. Inc. is a citizen or resident of the State of Oregon.

Wherefore, these defendants pray:

(1) That this action be dismissed;

(2) If the action is not dismissed, that plaintiff take nothing thereby; and

(3) If the action is not dismissed, that judgment be entered against defendant Kerr Gifford & Co. Inc. for the sum of \$15,000, with interest at 6 per cent from November 15, 1953, in favor of A. G. Kirschmer, if he is made a defendant, or if he is not made a defendant then in favor of defendants Barr in trust for said A. G. Kirschmer.

/s/ RANDALL B. KESTER,

Of Attorneys for Defendants Clay
Barr and Betty Barr

Of Counsel:

Maguire, Shields, Morrison & Bailey,
Attorneys for Defendants Barr

Acknowledgment of Service attached.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM FOR INTERPLEADER OF DEFENDANT KERR GIFFORD & CO. INC.

Defendant Kerr Gifford & Co. Inc. for answer to plaintiff's complaint, admits and denies as follows:

I.

Admits the allegations of Paragraphs I through IV inclusive of plaintiff's complaint.

II.

Alleges it has not sufficient information or knowledge to form a belief as to the truth or falsity of the allegations of Paragraphs V, VI and VII of plaintiff's complaint and therefore denies the same and the whole thereof.

III.

Denies the allegations of Paragraphs VIII and IX, except that defendant admits it is a corporation organized under the laws of the State of Oregon and engaged in the business of buying and selling of grains and that it purchased from the defendants Clay Barr and Betty Barr a crop produced upon the premises mentioned in plaintiff's complaint and that said defendants, their successors and assigns, were entitled to one half of the proceeds of said crop.

And as a Counterclaim for Interpleader, Defendant Kerr Gifford & Co. Inc. alleges as follows:

I.

Kerr Gifford & Co. Inc. is a corporation, organized and existing under the laws of the State of Oregon.

II.

Plaintiff J. P. Tonkoff and beneficiaries E. J. Welch and Viola Welch are residents and citizens of the State of Washington; beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are residents and citizens of the State of Idaho; defendants Clay Barr and Betty Barr are residents and citizens of the State of Oregon; and Albert G. Kirschmer is a resident and citizen of Texas.

III.

During the crop year 1953 defendants Clay Barr and Betty Barr sold to defendant Kerr Gifford & Co. Inc. certain grains produced by them on lands leased from Albert G. Kirschmer and Virginia Kirschmer, husband and wife, and Frank Hofues and Dorothy Hofues, husband and wife, as lessors under a lease which provided that the lessees were entitled to one half of the crop; that the grains were purchased for the full price of \$88,746.53 and the defendants Clay Barr and Betty Barr, as lessees, or those claiming by, through or under them were entitled to one-half of the proceeds, namely, \$44,373.28, which sum Kerr Gifford & Co., Inc. presently holds for the persons entitled to same.

IV.

Defendant is informed and therefore alleges that defendants Clay Barr and Betty Barr have assigned to Albert G. Kirschmer of Amarillo, Texas, all of their right, title and interest in and to the sum of \$15,000.00 of said proceeds, being the cost of harvesting, as alleged in plaintiff's complaint.

V.

Plaintiff J. P. Tonkoff has made demand upon Kerr Gifford & Co. Inc. for all of the lessees' share of the proceeds of the crop and the defendants Clay Barr and Betty Barr, on behalf of their assignee, Albert G. Kirschmer, have made demand upon Kerr Gifford & Co. Inc. for \$15,000.00 of the proceeds of said crop.

VI.

Defendant cannot safely determine which of said claimants is entitled to said proceeds, or a portion thereof, and consequently is or may be exposed to double or multiple liability.

Wherefore, defendant Kerr Gifford & Co. Inc. demands

(1) That the Court order Albert G. Kirschmer of Amarillo, Texas, be made a party defendant and required to respond to the complaint and to this counterclaim;

(2) That the Court order plaintiff, the defendants Clay Barr and Betty Barr and said Albert G. Kirschmer to interplead their respective demands and claims;

(3) That the Court establish which of said parties are entitled to said sum of \$44,373.28, or portion thereof;

(4) That the Court order defendant Kerr Gifford & Co. Inc. be discharged from any and all liability in the premises upon the deposit by it into the Registry of the Court of the sum of \$44,373.28; and

(5) That the Court award to defendant Kerr Gifford & Co. Inc. its costs and attorney fees herein.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ HARRY DeFRANCO,

Attorneys for Defendant Kerr

Acknowledgment of Service attached.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL DE-
FENDANT AND DIRECTING ISSUANCE
OF PROCESS

Based upon the motion of the defendant Kerr Gifford & Co. Inc. for an order that A. G. Kirschmer be brought in as a defendant and that process duly issue to and be served upon him, and the Court having heard argument of counsel and it appearing that good cause therefor exists;

It Is Hereby Ordered that A. G. Kirschmer be

and hereby is brought in as an additional defendant and that process shall duly issue to and be served upon A. G. Kirschmer and that the return date upon the process issued to A. G. Kirschmer to be served in the State of Texas shall be 20 days from the date of service.

Done in open Court at Portland, Oregon, this 7th day of June, 1954.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed June 17, 1954.

Title of District Court and Cause.]

MOTION

Comes now A. G. Kirschmer, named as an additional defendant herein, and moves the court for an order dismissing the so-called counterclaim for interpleader, filed herein by defendant Kerr Gifford & Co. Inc., on the following grounds:

(1) The court has no jurisdiction over the subject matter, for the reason that no claimant to the fund is a citizen or resident of the State of Oregon, as the defendants Barr make no claim to the fund on their own behalf.

(2) The court has no jurisdiction over this defendant, for the reason that this defendant is a citizen and resident of the State of Texas, and he

has not been served with summons or other process within the State of Oregon.

(3) The venue of this cause is improper for the reason that no claimant to the fund is a resident of the State of Oregon, as the defendants Barr make no claim to the fund on their own behalf.

(4) The purported process herein, as to this defendant, was and is insufficient, for the reason that this court has no power to issue its process to be served outside the State of Oregon, there being no jurisdiction or venue for interpleader.

(5) The purported service of process upon this defendant was and is insufficient, in that the same was not served within the State and District of Oregon, but was attempted to be served upon the wife of this defendant, in the State of Texas.

(6) The alleged counterclaim for interpleader does not state a claim on which relief can be granted, for the reason that it appears on the face thereof that this court has no jurisdiction of the subject matter and that venue is improper.

/s/ WILLIAM E. DOUGHERTY,
Attorney for Defendant A. G.
Kirschmer

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 13, 1954.

[Title of District Court and Cause.]

RESIGNATION

In accordance with the demand of E. J. Welch, Viola A. Welch, Roland P. Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff, Beneficiaries under "Declaration of Trust" dated June 10, 1953, and J. P. Tonkoff, Trustee under said agreement, the undersigned, Horton Herman, does hereby resign from such trusteeship.

Dated this 26th day of January, 1954.

/s/ HORTON HERMAN

[Endorsed]: Filed October 18, 1954.



[Title of District Court and Cause.]

REPLY TO ANSWER OF DEFENDANTS
BARR

Plaintiff by way of reply to the defenses contained in the answer of defendants Barr, denies each and every allegation therein contained, except as the same is not inconsistent with plaintiff's complaint.

1. That prior to June of 1953 E. J. Welch, through plaintiff J. P. Tonkoff, instituted an action in the Superior Court of the State of Washington in and for Spokane County against Clay Barr and Sterling Higgins, charging said defendants with a

fraudulent conspiracy and praying for damages in excess of \$80,000.00.

2. That at the said time Horton Herman was a practicing attorney in Spokane, Washington and appeared in the above referred to action on behalf of the defendant Clay Barr.

3. That during the course of said trial and before the same was consummated and upon the proposal of Horton Herman on behalf of the defendant Clay Barr, a settlement was proposed whereby it was agreed that Welch's claim would be settled and compromised for the sum of \$62,500.00, payable in the following amounts: J. P. Tonkoff, \$15,000.00; E. J. Welch and Viola Welch, his wife, \$27,500.00; Roland Charpentier and Effie Charpentier, his wife, \$15,000.00; John Cramer, \$5,000.00; providing the said sum was to be obtained from the proceeds of a 2800 acre grain crop in which the defendant Clay Barr had a half-interest and situate in Siskiyou County, California on a certain property known as the Meis Ranch.

4. That during said negotiations, the said Horton Herman insisted that an additional sum of \$10,000.00 be paid to him as attorneys' fees and that said sum should be obtained from the grain crop. Consequently, the "Declaration of Trust" which was executed by the parties, a copy of which is attached to plaintiff's complaint, was executed and delivered.

5. Thereafter, on or about the 9th day of July, 1953, this plaintiff believes and therefore alleges, that Horton Herman conveyed his interest to Har-

vey Barr, the father of Clay Barr, for the sum of \$7,500.00.

6. That on or about the 2nd day of July, 1953, this plaintiff and E. J. Welch, having been informed that the grain crop was improperly farmed, induced the said Clay Barr to visit said ranch in the company of plaintiff J. P. Tonkoff and E. J. Welch, at which time it was discovered that said crop was grievously neglected and that the same had not been properly irrigated or cultivated, and at which time the said Clay Barr promised and agreed to immediately start farming said crop in accordance with the "Declaration of Trust" but refused and failed to comply with said promise and agreement.

7. Thereafter, on or about the 12th day of October, 1953, this plaintiff believes and therefore alleges, that Clay Barr and Betty Barr, his wife, assigned and transferred to A. G. Kirschmer \$15,000.00 provided for in the "Declaration of Trust" to be paid to Clay Barr.

8. That thereafter, during the months of October and November, 1953, defendants Clay Barr and Betty Barr, his wife, harvested the crops growing on the Meis ranch and refused and failed to deposit said crops in accordance with the terms of the "Declaration of Trust" which provides "that the assignors (referring to Clay and Betty Barr) herein agree upon the harvest of said assigned crop to deposit the same at their expense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the assignees. It is agreed that at the earliest practical date, not in any event

to be later than November 15, 1953, said crop to be sold up to the extent of \$72,500.00 net to the assignees; and that the assignees shall upon the receipt of said sum endorse and deliver over to the assignors all warehouse receipts, if any, representing any of said crops not so sold," but instead sold and delivered all of said crops belonging to the said defendants Clay and Betty Barr, his wife, to Kerr-Gifford Co.

9. That thereafter, subsequent to the 15th day of November, 1953, this plaintiff made demands upon Kerr-Gifford Co. for the proceeds of said crops, but was refused payment, and thereafter this plaintiff requested Horton Herman to join this plaintiff as party plaintiff in the institution of an action against Clay Barr and Betty Barr and against Kerr-Gifford Co. to obtain the proceeds which rightfully belonged to this plaintiff and the beneficiaries in the "Declaration of Trust" but that the said Horton Herman refused to join said plaintiff and therefore this plaintiff brought an action designating Horton Herman as a party defendant, and which action was brought in the Federal District Court at Portland, Oregon.

10. After said action was instituted, the said Horton Herman filed motions and advised the court that there was no merit to plaintiff's claim and consequently the said action was dismissed. Thereafter, prior to the 26th day of January, 1954, demand by this plaintiff and the beneficiaries was made upon Horton Herman for his resignation as trustee under the "Declaration of Trust" or action would be instituted to remove him as such. Pursuant to said

demands, the said Horton Herman resigned as trustee, a copy of which resignation is attached to plaintiff's complaint.

11. That neither Horton Herman nor Harvey Barr is represented by Randall B. Kester, attorney for Clay and Betty Barr, and that any claims made in this court concerning the improper resignation of Horton Herman or the dissatisfaction of Harvey Barr is a collateral issue and not within the issues of this case and in any event the court could make such orders as would protect the said Harvey Barr from sustaining any loss.

12. That this plaintiff specifically denies that his claim of \$15,000.00 referred to in defendants' answer and assigned to Kirschmer, is sham and frivolous and without right or color of right, and alleges that defendants Clay Barr and Betty Barr have refused to authorize the delivery of the sums from the proceeds which are now on deposit with the Clerk of the above-entitled court, in excess of \$15,000.00, to be paid to this plaintiff and the beneficiaries under the "Declaration of Trust" for the sole and only purpose of forcing a settlement of the foregoing action.

13. That the said Harvey Barr is a total stranger to the "Declaration of Trust" and there exists no privity of contract between Clay Barr nor Harvey Barr and has no standing in this court under said "Declaration of Trust".

14. To dismiss the foregoing action would deprive this plaintiff of his remedy against the defendants Barr for the reason that immediately

upon being served with summons and complaint in the Spokane action, the said Barrs moved from Spokane, Washington to Arlington, Oregon and have been residents of Oregon since said time.

Wherefore, having fully answered defendants' answer and defenses contained therein, plaintiff prays for judgment in accordance with his complaint.

FERTIG & COLOMBO,
 /s/ By VIRGIL COLOMBO,
 TONKOFF, HOLST & HOPP,
 Attorneys for Plaintiff

Certificates of Service attached.

[Endorsed]: Filed October 26, 1954.

[Title of District Court and Cause.]

CLAIM IN INTERPLEADER

Come now defendants Clay Barr and Betty Barr, pursuant to the Order of Interpleader entered herein on September 15, 1955, and without waiving their objections to interpleader as set forth in their amended answer on file herein, assert the following claim:

I.

That of the fund of \$44,373.28 deposited in court by Kerr Gifford & Co., Inc., the sum of \$15,000 was expressly reserved to these defendants by the assignment of June 10, 1953, to cover their cost of

harvesting; that their cost of harvesting in fact exceeded the amount of \$15,000; that on or about October 12, 1953, these defendants, for value received, sold, assigned and transferred to A. G. Kirschmer, whose residence was and is Amarillo, Texas, said sum of \$15,000 to which these defendants were entitled from the proceeds of the 1953 grain crop from the Meiss Ranch; that notice of said assignment was duly given to Kerr Gifford & Co.; that said assignment is still in full force and effect; and that said sum of \$15,000 is now owned by said A. G. Kirschmer, and plaintiffs have no rightful claim thereto.

II.

That pursuant to the consent of said A. G. Kirschmer, these defendants hereby assert on his behalf a claim to said sum of \$15,000 out of the proceeds now on deposit with this court.

Wherefore, these defendants pray for judgment against the fund now on deposit with this court in the amount of \$15,000, in favor of these defendants as trustees for said A. G. Kirschmer.

/s/ RANDALL B. KESTER,

Of Attorneys for Defendants Barr

Acknowledgment of Service attached.

[Endorsed]: Filed October 25, 1955.

[Title of District Court and Cause.]

ORDER OF INTERPLEADER

The above-entitled proceedings came on for pre-trial conference on September 12, 1955, and plaintiffs appeared by J. P. Tonkoff, individually and as attorney for plaintiffs, and by Virgil Colombo, of their attorneys; defendants Clay Barr and Betty Barr appeared by Randall B. Kester of Maguire, Shields, Morrison & Bailey, their attorneys; the additional defendant A. G. Kirschmer appeared by William E. Dougherty, his attorney; and defendant Kerr Gifford & Co. Inc. appeared by Harry J. DeFrancq of Koerner, Young, McCulloch & Dezen-dorf, its attorneys; and the Court having heard argument of counsel with respect to the answer and counterclaim for interpleader of defendant Kerr Gifford & Co. Inc., it is

Ordered that defendant Kerr Gifford & Co., Inc. is discharged from any and all further liability to either the plaintiffs, the defendants Clay Barr and Betty Barr, or the additional defendant A. G. Kirschmer because of the payment into the registry of this Court by it of the sum of \$44,373.28 on May 20, 1954; and it is further

Ordered that the plaintiffs, the defendants Clay Barr and Betty Barr, and the additional defendant Albert G. Kirschmer interplead their respective demands and claims to said fund of \$44,373.28; and it is further

Ordered that the determination of the amount, if

any, to be paid to the defendant Kerr Gifford & Co. Inc. out of said fund for costs and attorneys' fees be deferred pending further proceedings herein; and it is further

Ordered that jurisdiction of these proceedings be retained by this Court for the purpose, inter alia, of determining the rights of the plaintiffs, the defendants Clay Barr and Betty Barr, and the additional defendant A. G. Kirschmer in and to the said fund.

Dated September 15, 1955.

/s/ CLAUDE McCOLLOCH,
United States District Judge

[Endorsed]: Filed September 15, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Granting plaintiffs complete sincerity, I cannot accept their view of the controlling facts of the case. Landowner Kirschmer exonerates defendant and I do the same. One of plaintiffs' leading witnesses had an obvious interest in exculpating himself, another in paying off an old grudge.

The case has been hard fought, and the parties no doubt will desire to appeal. Will the attorneys please submit orders that will clean the record, so that all of the difficult questions that have been raised during the long drawn out proceedings may be properly presented to the Court of Appeals.

No personal judgment for costs.

Dated November 4, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed November 4, 1955.

[Title of District Court and Cause.]

ORDER OF DISTRIBUTION

Findings of Fact, Conclusions of Law and Judgment having been entered herein, it is hereby

Ordered that the sum of \$44,373.28 deposited in the registry of this court by Kerr Gifford & Co., Inc., in connection with its counterclaim for interpleader, be distributed as follows, and the Clerk of this Court is hereby ordered to pay out the following sums from the registry of this court:

(1) The sum of \$15,000.00 be paid therefrom to defendants Clay Barr and Betty Barr as trustees for the use and benefit of the additional defendant A. G. Kirschmer.

(2) From the balance, the sum of \$500.00 be paid to Harry DeFrancq and Koerner, Young, McCulloch & Dezendorf, attorneys for Kerr Gifford & Co., Inc., as attorneys fees with respect to said interpleader.

(3) The balance of said fund, amounting to \$28,873.28, be paid to J. P. Tonkoff, Trustee, and Ton-

koff, Holst and Hopp, attorneys, and Fertig and Colombo, attorneys.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Approved as to Form:

/s/ W. B. HOLST,
Of Tonkoff, Holst & Hopp

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the undersigned, Judge of the above-entitled court, all parties having waived jury trial, on the 27th and 28th day of October, 1955. Plaintiff appeared in person and as attorney and by David Fertig of his attorneys, and defendants Clay Barr and Betty Barr appeared in person and by Randall B. Kester of their attorneys. Defendant Kerr-Gifford & Co., Inc. did not appear, having previously been discharged from any and all further liability by the Order of Interpleader entered herein on the 15th day of September, 1955. The additional defendant, A. G. Kirschmer, did not appear, having authorized

defendants Barr to assert on his behalf his claim to a portion of the fund now on deposit with the court.

The parties thereupon introduced evidence and rested, and counsel for the respective parties argued the case, and the cause was duly submitted and taken under advisement by the court. Counsel for the respective parties submitted memoranda of law, and thereafter the court handed down its memorandum of decision dated the 4th day of November, 1955, which is by this reference incorporated herein. Now, therefore, being fully advised, the court hereby makes and enters the following:

Findings of Fact

I.

Plaintiff, J. P. Tonkoff, as well as the beneficiaries E. J. Welch and Viola Welch, are residents of the State of Washington. The beneficiaries Roland P. Charpentier and Effie Charpentier and John W. Cramer are all residents of the State of Idaho. The defendants Clay Barr and Betty Barr are residents of the State of Oregon. The defendant Kerr Gifford & Co., Inc. is a corporation of the State of Oregon. The additional defendant, A. G. Kirschmer, is a resident of the State of Texas. The amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

II.

On or about the 7th day of May, 1953, defendants Barr entered into a lease of the Meiss Ranch, lo-

located in Siskiyou County, California, from the owners, Frank Hofues and Dorothy Hofues, husband and wife, and Albert G. Kirschmer and Virginia Kirschmer, husband and wife, which lease provided among other things that the lessors would receive as rental 50% of the gross proceeds received by lessees from the operation of said ranch. Prior to said lease said ranch had been operated by J. C. Stevenson, Jr., as manager under a written contract with the owners, and said management contract remained in effect through the 1953 harvest season.

III.

On the 10th day of June, 1953, at Spokane, Washington, on consideration of the settlement of a certain action at law and attorneys' fees therein involved, defendants Barr executed an assignment of their right, title and interest in and to the growing crops to be harvested in 1953 on said Meiss Ranch, to J. P. Tonkoff and Horton Herman, for the benefit of said assignees and Roland P. Charpentier and his wife and E. J. Welch and Viola Welch, his wife, and John W. Cramer, reserving unto defendants Barr the sum of \$15,000.00 from said proceeds to cover their cost of harvesting. Thereafter, on the 10th day of June, 1953 said J. P. Tonkoff and Horton Herman executed a Declaration of Trust providing for the distribution of the assigned portion of the proceeds of said crops among the persons for whose benefit said assignment was made, in the following amounts, or a ratable proportion thereof if the total did not equal \$72,500.00, to-wit:

J. P. Tonkoff	15,000.00 (20.69%)
Horton Herman	10,000.00 (13.79%)
E. J. and Viola Welch	27,500.00 (37.93%)
Roland and Effie Charpentier	15,000.00 (20.69%)
John W. Cramer	5,000.00 (6.89%)
	<hr/>
	72,500.00 (99.99%)

IV.

On or about July 9, 1953, Horton Herman, assignee in said assignment of June 10, 1953, and a beneficiary under said declaration of trust, for value received, sold, assigned and transferred to Harvey S. Barr, a resident of the State of Washington, all of said Horton Herman's right, title and interest as beneficiary under said declaration of trust, and all interested persons were duly notified of said assignment.

V.

Thereafter said crops were harvested and sold to defendant Kerr Gifford & Co., Inc., for the total sum of \$88,746.53. Said sale was made by J. C. Stevenson, Jr., on behalf of the owners for the owners' one-half interest, and by E. J. Welch, on behalf of J. P. Tonkoff and Horton Herman, for the lessees' one-half interest which had been assigned to said Tonkoff and Herman. In the harvesting of said crops the defendants Barr incurred harvesting costs in excess of \$15,000.00.

VI.

On or about October 12, 1953, defendants Barr, for value received, sold, assigned and transferred to said A. G. Kirschmer the sum of \$15,000.00 which

defendants Barr were to receive from Kerr Gifford & Co., Inc. under the terms of the assignment of June 10, 1953, from the lessees' one-half of the proceeds of said crops, and all interested persons were duly notified of said assignment.

VII.

After the harvest and sale of said crops, but before payment by Kerr Gifford & Co., Inc. of the proceeds thereof, plaintiff J. P. Tonkoff made demand upon Kerr Gifford & Co., Inc. for payment to him of all the lessees' one-half of the proceeds of said crops, including the amount of \$15,000.00 which had been reserved by defendants Barr and by them assigned to A. G. Kirschmer. Defendants Barr, on behalf of their assignee, A. G. Kirschmer, also made demand upon Kerr Gifford & Co., Inc. for the payment to A. G. Kirschmer of said sum of \$15,000.00. By reason of said demands, Kerr Gifford & Co., Inc. declined to pay either claimant, and in connection with its counterclaim for interpleader, defendant Kerr Gifford & Co., Inc. paid into the registry of the court the sum of \$44,373.28, representing the lessees' one-half of the proceeds of said crops, including the controverted sum of \$15,000.00.

VIII.

On or about the 26th day of January, 1954, said Horton Herman executed a document stating that he resigned as trustee under the Declaration of Trust of June 10, 1953, in accordance with the demands of E. J. Welch, Viola A. Welch, Roland P.

Charpentier, Effie G. Charpentier, John W. Cramer and J. P. Tonkoff. Said Harvey S. Barr, who then owned the beneficial interest formerly owned by Horton Herman under said Declaration of Trust, did not demand such resignation, nor did he consent to it, and he notified Horton Herman that he objected to and refused to accept such resignation.

IX.

That \$500.00 is a reasonable attorneys fee to be allowed to attorneys for Kerr-Gifford Co., for services rendered.

X.

Plaintiff has failed to sustain the claims alleged in the complaint, and the court finds:

(a) That the defendants Barr did not make any false or untrue warranty with respect to the acreage of growing crops on the Meiss ranch.

(b) That the defendants Barr did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like fashion;

(c) That the defendants Barr did not breach or fail to perform any covenant, provision, or condition of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

Now, Therefore, based on the foregoing Findings of Fact, the court makes and enters the following:

Conclusions of Law

I.

That the court has jurisdiction of the parties and of the subject matter of this cause.

II.

That plaintiff is not entitled to judgment against the defendants.

III.

That the sum of \$15,000.00, from the funds now on deposit in the registry of this court, should be paid to defendants Barr as trustees for the use and benefit of the additional defendant, A. G. Kirschmer.

IV.

From the balance, the sum of \$500.00 should be paid to Harry DeFrancq and Koerner, Young, McCulloch & Dezendorf, attorneys for Kerr Gifford & Co., Inc., as attorneys fees with respect to said interpleader.

V.

The balance of said fund, amounting to \$28,873.28, should be paid to J. P. Tonkoff, Trustee, and Tonkoff, Holst and Hopp, attorneys, and Fertig and Colombo, attorneys.

VI.

That a Judgment and Order of Distribution should be entered in accordance herewith.

VII.

That no party should recover costs herein.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed December 8, 1955.

In the United States District Court for the District
of Oregon

Civil No. 7,378

J. P. TONKOFF, individually, and J. P. Tonkoff,
as Trustee of E. J. Welch and Viola Welch,
husband and wife, Roland P. Charpentier and
Effie Charpentier, husband and wife, and John
W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and
wife, and KERR-GIFFORD CO., a corpora-
tion, Defendants,

A. G. KIRSCHMER, Additional Defendant.

JUDGMENT

The court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is hereby Considered, Ordered and Adjudged as follows:

- (1) That plaintiff take nothing by virtue of this action against the defendants, or any of them;
- (2) That no party recover costs herein.

Done in open court at Portland, Oregon, this 8th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

[Endorsed]: Filed December 8, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Clay Barr and Betty Barr, husband and wife,
and McGuire, Shields, Morrison & Bailey and
Randall B. Kester, their attorneys:

Notice is hereby given that J. P. Tonkoff, individually and as trustee, who is the plaintiff above named, appeals to the Court of Appeals for the Ninth Circuit from so much of the judgment entered in this action on the 8th day of December, 1955, as dismisses and disallows plaintiff's cause of action, both individually and as trustee, against the defendants, Clay Barr and Betty Barr, husband and wife, for damages arising out of a breach of contract.

Dated this 28th day of December, 1955.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents: That we, J. P. Tonkoff, individually, and J. P. Tonkoff, as Trustee of E. J. Welch and Viola Welch, husband and wife,

Roland Charpentier, and Effie Charpentier, husband and wife, and John W. Cramer, as Principals, and United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, of Baltimore, Maryland, having an office and usual place of business at Portland, Oregon, as Surety, are held and firmly bound unto Clay Barr and Betty Barr, husband and wife, and Kerr-Gifford Co., a corporation, in the sum of Two Hundred Fifty and No/100ths Dollars (\$250.00), lawful money of the United States of America, to be paid to the said Clay Barr and Betty Barr and Kerr-Gifford Co., a corporation, heirs, executors, administrators, successors or assigns, for which payment well and truly to be made and done we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this.....day of
....., 19...

Whereas, the aforesaid Principals are filing notice of appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the judgment of the District Court of the United States for the District of Oregon in the said suit or proceeding.

Now the Condition of This Obligation Is Such, That if the said Appellant shall pay the costs if the appeal is dismissed or the judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation to be

void; otherwise to remain in full force and virtue.

/s/ J. P. TONKOFF, Individually,

/s/ J. P. TONKOFF as Trustee for Above
Named Plaintiffs and as Attorney

[Seal] UNITED STATES FIDELITY AND
GUARANTY COMPANY,

/s/ By GEORGE H. MAYES,
Attorney-in-fact

Sealed and delivered in the presence of:

/s/ Dorothy Everest

/s/ Gerald H. Robinson

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OR RECORD
ON APPEAL

To the Clerk of the above-entitled Court:

Comes Now the above-named plaintiff, who has appealed to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause, and designates the following as the portions of the records, proceedings and evidence to be contained in the record on appeal:

1. Plaintiff's complaint and documents affixed thereto.
2. Motion of defendants Barr to dismiss.
3. Order denying motion to dismiss of defendants Barr, dated March 15, 1954.

4. Amended answer of defendants Barr filed May 17, 1954.

5. Answer and counter-claim for interpleader of defendant, Kerr-Gifford & Co., Inc.

6. Order bringing in additional party defendant, A. G. Kirschmer, dated June 17, 1954.

7. Motion of A. G. Kirschmer filed August 13, 1954.

8. Resignation of Horton Herman, dated June 26, 1954.

9. Reply to answer of defendants Barr, filed October 26, 1954.

10. Claim in interpleader, filed October 26, 1954.

11. Order of interpleader, filed September 15, 1955.

12. All exhibits being Exhibits Nos. 1-19, inclusive.

13. Reporter's complete transcript of trial proceedings, excluding therefrom the evidence adduced on behalf of Kerr-Gifford in support of attorneys' fees, and further excluding therefrom the evidence adduced on behalf of J. P. Tonkoff for attorneys' fees, trustee's fees and costs.

14. All depositions which were published by order of court and read by the court, namely:

(a) Deposition of A. G. Kirschmer, taken January 5, 1955, at Amarillo, Texas.

(b) Depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and J. R. Ratliff, Jr.; with attached exhibits, all contained in one volume,

but excluding therefrom the depositions of J. C. Stevenson, Sr. and J. C. Stevenson, Jr., whose depositions were also taken and contained in the single volume of depositions, but who testified in person at the time of trial.

(c) Deposition of Frank Kofues.

(d) Deposition of Horton Herman and attached exhibits.

15. Memorandum Decision of trial court, filed November 4, 1955.

16. Order of distribution, dated December 8, 1955.

17. Findings of Fact and Conclusions of Law, dated December 8, 1955.

18. Judgment or Decree, dated December 8, 1955.

19. Notice of Appeal.

20. Undertaking on appeal.

21. This designation of record.

22. Statement of points relied on by plaintiff for reversal of judgment.

You will please include the above data in making up the record on appeal.

Dated this 28th day of December, 1955.

/s/ FERTIG & COLOMBO,

/s/ TONKOFF, HOLST & HOPP,

/s/ J. P. TONKOFF,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 28, 1955.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
EXHIBITS

Upon oral motion of the plaintiff, and it appearing to the court that the plaintiff has appealed from the judgment in this cause to the Ninth Circuit Court of Appeals at San Francisco, California, and it further appearing to the court that the exhibits in evidence in this cause are necessary for a full consideration of the appeal being prosecuted,

Now, Therefore, It Is Hereby Ordered that the Clerk of this court be and he is hereby directed to transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, all of the exhibits in this cause, and in addition thereto the depositions in this cause, at the time the designated record is forwarded to the Clerk of the Ninth Circuit Court of Appeals at San Francisco, California.

Done in Open Court this 29 day of December, 1955.

/s/ GUS J. SOLOMON,
Judge

Presented by:

/s/ J. P. TONKOFF,
Of Attorneys for Appellant

[Endorsed]: Filed December 29, 1955.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

Comes now the appellant and sets forth the following statement of points upon which he intends to rely upon appeal:

I.

The court erred in entering judgment for the defendants and appellees, Clay Barr and wife, and against the plaintiff.

II.

The court erred in its findings of fact in finding that the management contract of J. C. Stevenson, Jr., remained in effect through the 1953 harvest season and that it had any bearing whatsoever in the controversy between the plaintiff, J. P. Tonkoff, and the defendants, Clay Barr and wife.

III.

The court erred in Paragraph 9, sub-section (a) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not make any false or untrue warranties with respect to the acreage of growing crops on the Meiss ranch.

IV.

The court erred in Paragraph 9, sub-section (b) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not fail, refuse or neglect to farm the Meiss ranch in a good and farmer-like fashion.

V.

The court erred in Paragraph 9, sub-section (c) of its findings of fact in finding as a fact that the defendants, Clay Barr and wife, did not breach or fail to perform any covenants, provisions or conditions of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

VI.

The court erred in Paragraph 2 of its conclusions of law in concluding that the plaintiff is not entitled to judgment against the defendants, Clay Barr and wife, for the amount prayed for in plaintiff's complaint.

VII.

The court erred in failing and refusing to find as a matter of fact that defendants, Clay Barr and wife, made false and untrue statements as to the acreage of growing crops on the Meiss ranch.

VIII.

The court erred in failing and refusing to find as a fact that the defendants, Clay Barr and wife, failed, refused or neglected to farm the Meiss ranch in a good and farmer-like fashion.

IX.

The court erred in failing to find as a fact that the defendants, Clay Barr and wife, committed waste in the operation of the Meiss ranch to the loss and detriment of the plaintiff and others similarly situated.

X.

The court erred in failing to find as a fact that the defendants, Clay Barr and wife, breached or failed to perform the covenants, provisions, or conditions of the assignment dated the 10th day of June, 1953, or any subsequent promise or agreement.

XI.

The court erred in failing to enter judgment in favor of the plaintiff against the defendants, Clay Barr and wife, for the amount prayed for in plaintiff's complaint with interest thereon from the 15th day of November, 1953.

Dated this 28 day of December, 1955.

FERTIG & COLOMBO,
TONKOFF, HOLST & HOPP,
/s/ By WILLIAM B. HOLST,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 4, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Com-

plaint; Defendants' motion to dismiss action; Order denying motion to dismiss action; Amended answer of defendants Barr; Answer and counter-claim for interpleader of defendant Kerr Gifford; Order bringing in additional defendant and directing issuance of process; Motion to dismiss counterclaim for interpleader; Resignation of Horton Herman; Reply to answer of Defendants Barr; Claim in interpleader; Order of interpleader; Memorandum of decision; Order of distribution; Findings of fact and conclusions of law; Judgment; Notice of appeal; Bond for costs on appeal; Designation of contents of record on appeal; Order directing transmittal of exhibits; Concise statement of points upon which appellant intends to rely upon appeal; and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7378 in which J. P. Tonkoff, et al., are the plaintiffs and appellants and Clay Barr, et al., are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that there is enclosed exhibits 1 to 19, inclusive. Depositions in four volumes are being forwarded under separate cover and the reporter's transcript of testimony will be forwarded at a later date.

I further certify that the cost of filing the notice of appeal, \$5.00 has been paid by the appellants.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 1st day of February, 1956.

[Seal] R. DeMOTT,
 Clerk
/s/ By THORA LUND,
 Deputy

In the United States District Court for the
District of Oregon

Civil No. 7378

J. P. TONKOFF, individually, and J. P. TONKOFF, as Trustee of E. J. Welch and Viola Welch, husband and wife, Roland P. Charpentier and Effie Charpentier, husband and wife, and John W. Cramer, Plaintiff,

vs.

CLAY BARR and BETTY BARR, husband and wife, and KERR-GIFFORD CO., a corporation, Defendants,

A. G. KIRSCHMER, Additional Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, October 27, 1955

Before: Honorable Claude McColloch, Chief Judge.

Appearances: Messrs. Tonkoff, Holst & Hopp, by Mr. J. P. Tonkoff and Mr. William B. Holst, and Mr. David H. Fertig, Attorneys for Plaintiff.

Messrs. Maguire, Shields, Morrison & Bailey, by Mr. Randall B. Kester, Attorneys for Defendants Clay Barr and Betty Barr. husband and wife. [1*]

The Court: Gentlemen, are you ready in this case?

Mr. Tonkoff: Plaintiff is ready, your Honor.

The Court: Do you have a pre-trial order?

Mr. Kester: I do not, your Honor.

The Court: Did you make an effort to agree on one?

Mr. Kester: No, there has been nothing said about a pre-trial order.

The Court: As a matter of course, Mr. Kester, I think you know in these cases under our practice we have a pre-trial order. But we will go ahead without it now. Put on your first witness.

Mr. Fertig: If the Court please, at this time, as a preliminary matter, Mr. Tonkoff with the consent of the Court has appeared in this case. It is his case originally. We have filed a motion requesting that Mr. Tonkoff of the State of Washington, who is admitted to practice before the Supreme Courts of the State of Oregon and State of Washington and the United States District Court in Washington, and also the Circuit Court of Appeals of this District, as well as his partner, Mr. William Holst, who has the same qualifications, be permitted to appear in this case on behalf of plaintiff. We are ask-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

ing if the Court will allow as a matter of record this order to be entered.

The Court: Any objection? [2]

Mr. Kester: No.

The Court: So ordered.

Mr. Fertig: Thank you.

JAMES C. STEVENSON

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. State your name, Mr. Stevenson.

A. James C. Stevenson.

Q. What has been your occupation?

A. I can't understand you.

Q. What has been your occupation, Mr. Stevenson?
A. I am a farmer and stockman.

Q. How long have you been engaged in that occupation?
A. All my life, 50 years.

Q. Where have you carried on your occupation, chiefly?
A. In the Klamath Basin.

Q. How long would you say you had been farming and raising stock there?
A. Since 1911.

Q. Did you acquire a certain piece of property spoken of [3] as the Meiss Ranch?

A. Yes, sir.

Q. When did you acquire that property?

A. In April, 1944.

(Testimony of James C. Stevenson.)

Q. Where is that property located?

A. It is in Siskiyou County, about five miles west of Macdoel, California.

Q. That is in California, you say?

A. Yes.

Q. How many acres does that consist of, that ranch?

A. 13,160 acres of deeded land.

Q. Would you just describe to the Court the terrain there and what the ranch consists of.

A. Well, there is about 3,000 acres of peat land, and there is meadow and hay land, alfalfa land, and then there is pasture and sagebrush land. Most of it is irrigated.

Q. What portion of that property can be cultivated, planted to grain?

A. Well, in the lake proper there is 3,000 acres in that, but there is other land that we have farmed besides that.

Q. Besides the 3,000 acres you have other property that is tillable?

A. Yes, that we have irrigated with pumps.

Q. Now you said you acquired the property when? A. 1944. [4]

Q. After you acquired the property did you make any improvements on it, Mr. Stevenson?

A. Oh, yes. It was a big lake, and we drained the lake and built a dike and burned all these tules off and worked the last of it up.

Q. What did you do with the water that was in the tules?

(Testimony of James C. Stevenson.)

A. We pumped it over the dike to the east, and it left about 3,000 acres in this one part.

Q. On what portion of the property is the dike located? A. On what part of it?

Q. Yes.

A. It runs about four miles through the property. I would say about halfway east of the buildings.

Q. What crops did you grow there while you were the owner of the ranch, Mr. Stevenson?

A. We raised mostly barley, and we had oats, wheat and rye.

Q. Who was managing or running the property at that time, at the time you owned it?

A. I was the manager, but my son was the foreman.

Q. When did your son start to manage the property after you acquired it?

A. When did my son?

Q. Yes. A. The next year after.

Q. Starting with what year? [5]

A. '45.

Q. How long did he remain as foreman or manager under you?

A. Well, I think he was off of the place about three years during that time.

Q. When did he finally leave the property?

A. You mean after I sold it?

Q. Yes, I mean after you sold it.

A. I don't get the question.

(Testimony of James C. Stevenson.)

Q. When did you sell the property, Mr. Stevenson?
A. I sold the property in '52.

Q. At that time was your son still on the property as foreman?
A. That is right, yes.

Q. Did he remain on the property after you disposed of the property as foreman?

A. Yes, he was retained by Mr. Hofues.

Q. Whom did you sell the property to?

A. Hofues and Kirschmer.

Q. What was Hofues' first name?

A. Frank Hofues.

Q. And A. G. Kirschmer of Texas?

A. Yes.

Q. After you sold the property to Mr. Hofues and Mr. Kirschmer did you retain or reserve any of the pasture land?

A. I rented all the pasture. [6]

Q. Did you rent it for the year 1953?

A. Yes.

Q. How many acres did you rent from them that year, Mr. Stevenson?

A. I rented it all.

Q. What?

A. I rented all the pasture.

Q. How many acres did it consist of?

A. Well, I rented the whole ranch. It was 13,160 acres. I rented the whole ranch.

Q. How many cattle did you have on that ranch in 1953?

A. We had a little over a thousand head.

Q. A little over a thousand?
A. Yes.

(Testimony of James C. Stevenson.)

Q. Would you describe to the Court the condition of the soil on that property, or what kind of soil it was.

A. Well, there is about three types of soil there. There is some alkali soil, and then there is some awful good land. It is supposed to test higher than any land in Siskiyou County. It tests 75 per cent.

Q. That is the soil that used to be——

A. That is where the tules was. Then there is some heavy dobe land that cracks open when it is dry. It is regular dobe land.

Q. Is that soil suitable for growing grain crops?

A. We raised grain on all of this land that I have described, yes.

Q. Now, can you tell us about what kind of production you got from raising wheat there.

A. What do you want to know?

Q. The pounds per acre.

A. Well, about a ton to the acre of wheat.

Q. About 2,000 pounds to the acre?

A. Yes.

Q. What about rye?

A. Well, rye you generally get around 1200 to 1500 pounds to the acre.

Q. How much oats? What was the production on oats?

A. A good year you would get around 3,000 pounds of oats.

Q. Let's see. What other crops?

A. Barley.

Q. What was your production on barley?

(Testimony of James C. Stevenson.)

A. In good years it run around 3,000 pounds.

Q. During the year 1953 can you describe or tell us what the growing conditions were in Klamath or in the vicinity of this ranch?

A. It was a very good year in '53. We had quite a few rainstorms, and it was a good growing year.

Q. How did that compare with other years, Mr. Stevenson?

A. Well, it was really better than some years. Of course, [8] in '47 we had a year similar to that.

Q. Would you say that was one of the outstanding years for favorable growing conditions?

A. In '47 we had the best crop that we ever raised there.

Q. About how high does the grain grow there if it is properly cared for and cultivated, Mr. Stevenson?

A. Well, the grain—I have some pictures of the grain there. The barley will get up, oh, waist-high, and just thick. But then when it gets so heavy it just mats down. And the oats gets up as high as under your arms. I have a picture of a man over six feet tall with his arms out this way, and the oats is right under his arms.

Q. Do you have any of those pictures with you?

A. I haven't, no.

Q. You didn't bring them with you. How often did you go on the ranch in 1953?

A. How often? Oh, I was there every week, I think once a week, anyway.

Q. During the growing season?

(Testimony of James C. Stevenson.)

A. Because I had my cattle there.

Q. Now, would you mind telling the Court just what the condition of these crops was in the middle of June?

A. The crops were very good in the middle of June.

Q. Did you notice a change in those crops during the growing season? [9]

A. Yes, there was quite a change on the upper—what we called the upper land.

Q. What did you observe as to the change?

A. Well, it was drying out.

Q. Can you grow crops down there without irrigating, Mr. Stevenson?

A. Oh, they do grow dry land grain there, but this particular place we irrigated.

Q. Was there ample water to supply irrigation during the year 1953? A. Yes, there was.

Q. Where did you get your irrigation water?

A. Well, we have a big lake there, and then we have creeks running into the place and we have wells.

Q. How many wells did you have on the ranch?

A. There was seven wells.

Q. Did you have pumps for them?

A. I don't think there was pumps in all of them. I think there was one that didn't have any.

Q. Could you get water out of the lake, out of the dike? A. Oh, yes.

Q. You say that there was plenty of water to irrigate in 1953?

(Testimony of James C. Stevenson.)

A. Yes, and there was a big pump to pump out of the lake that we used to irrigate with. [10]

Q. Can you tell the Court what you observed concerning dryness in 1953 along about harvest time? Did you see the condition of the ground?

A. Yes.

Q. Would you tell the Court what condition the ground was in.

A. Well, the ground on this upper land was all cracked open. There wasn't much there.

Q. Would you describe how wide those cracks were, Mr. Stevenson.

A. Oh, they run from an inch to three or four inches wide.

Q. What portion of these cracks extended over the cultivated fields?

A. How big an area, you mean?

Q. Yes.

A. Well, there was one piece up there—we always called it 400 acres—and that is where the dobe ground is. And then along the edges, along the edge of the big field, there must have been a hundred or more acres of heavy dobe land that cracked open.

Q. During the summer did you consult with Mr. Barr concerning the lack of irrigation or the dryness of the crops?

A. Yes. He used to ask my opinion on what to do on the place.

Q. What did you tell him? [11]

A. Well, I told him I would irrigate it on the

(Testimony of James C. Stevenson.)

upper land there, and I told him to be very careful not to get the water down too far in there.

Q. Did you specifically mention to him that there was not sufficient water on the property to produce a crop?

A. He knew that. He could see that. I told him sure, there was plenty of water, and the pumps was already there.

Q. Now did you observe anything about the condition of the crops concerning weeds?

A. Yes, there was a couple of fields going over to the east side that had weeds in them.

Q. What was the condition of those fields?

A. As to weeds, you mean?

Q. Yes.

A. The grain was up and the weeds was coming awful thick, and I asked Mr. Barr if he was going to spray for the weeds, and he said he was.

Q. Did he spray?

A. I don't think he sprayed then. I think he sprayed down one of the big canals. I don't think he sprayed out in the grain at all.

Q. What is the custom concerning spraying down there, spraying weeds?

A. They all spray for weeds whenever——

Q. Would you describe to the Court about how many acres [12] were taken by weeds?

A. Well, maybe 300 acres.

Q. What kind of crops were growing there?

A. I think he had barley in one of them and rye in the other one.

(Testimony of James C. Stevenson.)

Q. Did he harvest any part of that 300 acres, Mr. Stevenson?

A. Yes, he patched it out. He went in there and where the weeds wasn't too thick, why, he patched it out.

Q. About how many acres were not harvested due to the weeds?

A. I don't know. I couldn't hardly answer that. I wouldn't know.

Q. Do you know whether any of the grain was plowed up?

A. Yes, there was some of it plowed up.

Q. About how much was plowed up, Mr. Stevenson?

A. Well, I suppose about 200 acres.

Q. About 200 acres? A. Yes.

Q. Now, in your arrangement to pasture your cattle on the property were you paying a rental for that? A. I was, yes.

Q. Did you get any discount on your rental due to the fact that some of the crops were plowed up and were not available for pasture after the crops were harvested? [13]

A. Yes. Mr. Hofues reimbursed me for that.

Q. On how many acres were you reimbursed?

A. I think we settled for 300 acres. Some of it wasn't grain land that was plowed up. Some of it was alfalfa ground that was plowed up.

Q. Now, when would you run your cattle into the ranch there for pasture?

(Testimony of James C. Stevenson.)

A. They was on the ranch all summer. We turned them in the grain after they got done.

Q. After the grain was harvested did you go out through the fields to observe the manner in which it was harvested? A. I did, yes.

Q. Tell the Court what you found, Mr. Stevenson.

A. Well, it looked to me like a very sloppy job of harvesting. They lost quite a lot of grain.

Q. How did they lose it by harvesting?

A. Well, it looked to me like they traveled too fast, and some of it they didn't cut. It just pushed it over. A lot of it went over the back end into the windrow, too.

Q. Did it remain in the field? A. Yes.

Q. You ran your cattle over there in the field after the grain was harvested? A. Yes.

Q. Did you lose any cattle by reason of the grain that was [14] left on the field?

A. We did, yes.

Q. Would you explain how that happened?

A. Well, there was two cows bloated there. We cut them open to see what was the matter with them, and they was plumb full of grain.

Q. Is that customary if the grain is properly harvested? Do you usually have that much grain left there?

A. We never lost any cattle before that.

Q. In your experience is it your opinion that it was due to the excess of grain that was left in the field that was not harvested?

(Testimony of James C. Stevenson.)

A. Well, it might have been what was left in the field that was not harvested, or after it had been harvested and blowed over.

Q. Do you know whether or not Mr. Barr irrigated during 1953?

A. Irrigated the grain?

Q. Yes.

A. He didn't. No, I don't think he did.

Q. How often were you on the ranch, Mr. Stevenson?

A. I was on the ranch—well, I would be there once a week all summer. I had a man there taking care of the cattle, and I used to go to see how he was doing.

Q. Can you estimate, Mr. Stevenson, about how many pounds [15] per acre was left over? I mean that was spilled or was not harvested and left in the field?

A. Well, I didn't examine all these windrows. It was a pretty big field. My hired man called my attention to what grain was left in the fields. We was riding out there, and we would ride from one windrow to another in different places on the ranch, and we would get down and spread the windrows open and see the grain laying on the ground. From what I observed in the windrows and looked at it looked like there was about four or five hundred pounds of grain to the acre was left.

Q. That was not harvested and was left in the fields?

(Testimony of James C. Stevenson.)

A. Due to the fact it was blown over. It was harvested, but it was blown over.

Q. It wasn't delivered, anyway, it was left in the field?
A. Yes.

Q. I see. What was the size of the grain this particular year? How high did it grow, Mr. Stevenson, as you saw it?

A. Oh, on the good grain it was waist-high.

Q. When you say "good grain," was that grain that was well irrigated or moist?

A. That is some of this good ground. It holds moisture and it don't need to be irrigated. That is ground—it was irrigated when they put it in, but after it is farmed you don't have to irrigate it only the once. [16]

Q. What was the condition of the grain where it was drier and was not irrigated, where the ground was allowed to dry out.

A. It was very thin.

Q. What?

A. It was very thin and dried-up, also.

Q. How high was it?

A. Some of it was from four inches to maybe a foot high, and very thin.

Q. Now, having farmed the land and having grown grain in that country for many years, could you estimate about what percentage of the crop was harvested in the condition that it was? I mean in your estimation would you say this property was farmed in a good, farmerlike manner?

(Testimony of James C. Stevenson.)

A. It looked like it was a very slipshod way of farming to me. I wouldn't have had it done if I was—it would have been farmed different if I was doing it.

Q. Had it been farmed in a good, farmerlike manner, what in your opinion would it have produced by way of tonnage in barley, rye and wheat?

A. The year I was telling you about, in 1947, the grain averaged 3,000 pounds; that is, oats and barley.

Q. Oats and barley averaged that?

A. 3,000 pounds to the acre.

Q. What did the wheat yield? [17]

A. Well, wheat, about a ton, and rye about twelve or fifteen hundred pounds.

Q. Was there any frost that year during harvesttime?

A. Well, there might have been at harvesttime, but in the growing season there wasn't no frost.

Q. Were the crops affected by frost?

A. I don't think so.

Q. When did Mr. Barr take over the ranch that year, do you know?

A. It was sometime in May.

Q. Of 1953? A. That is right.

Q. On how many occasions did you see him on the ranch, Mr. Stevenson, during that summer?

A. Oh, I saw him several times. I don't remember just how many times. I saw him when he was putting the grain in, and I seen him afterwards.

Testimony of James C. Stevenson.)

Q. Did you give him any advice concerning the planting and the growing?

A. Yes, he asked me for advice as to what to do, and I told him what I do.

Q. What did he ask you? On what subjects did he ask you?

A. Well, he asked me about the irrigation of it, and he asked me about putting these paddles on these tractors so he could get the crop in earlier. The ground was pretty wet, [18] and we always put these wide extensions on our tractors so we could go out in wetter ground and work.

Q. Did he follow your advice concerning irrigation?

A. I don't think he did.

Q. Did he follow your advice concerning the spraying of the crops?

A. No, he didn't.

Mr. Tonkoff: Your Honor, I have a map here which I would like to have identified. I don't know what the rules are concerning showing it to the witness. I will ask him to identify it first.

Q. Mr. Stevenson, can you identify what that represents?

A. This is the Meiss Ranch. This is the dike that goes across and the lake is over on this side.

Q. Does that map disclose or represent the dike and the lake and the farming area of the Meiss Ranch?

A. Pretty well, yes.

Mr. Tonkoff: I will offer it in evidence, your Honor.

The Court: Admitted.

(Testimony of James C. Stevenson.)

(The map referred to was received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Tonkoff: Q. There is an area that is shown on the map there marked "Lake," is there not? Do you notice that on the map?

A. Where it is marked "Lake" that is the sump where we pumped [19] water over into——

Q. Does that lake dry out in the summertime?

A. Well, this year it did, but it hadn't been dry for several years.

Q. Is that a fresh-water lake?

A. It is fresh water. It is all snow water and fresh water that runs in there.

Q. That water that is pumped from the lake is the runoff from the mountains and hills, is it?

A. It is all snow water.

Mr. Tonkoff: That is all at the present.

Mr. Kester: If the Court please, I have another map on a larger scale. Will you show this to the witness.

Cross Examination

By Mr. Kester:

Q. Mr. Stevenson, do you recognize that as an enlargement of a map that you had while you were on the place?

A. What was the question?

Q. Do you recognize that as an enlargement of a map that you had while you were on the place?

A. Well, it looks like a map that we have had.

Mr. Kester: I would like to have that marked, and I offer it in evidence also.

(Testimony of James C. Stevenson.)

The Court: Admitted. [20]

(The map referred to was thereupon received in evidence and marked as Defendants' Exhibit 2.)

Mr. Kester: Q. Mr. Stevenson, this map that you identified in Mr. Tonkoff's examination, which is Exhibit No. 1, dated August of 1951, has a legend on it with respect to the classes of soil. Are you familiar with that yourself, like what Class 1, Class 2 and Class 3 soil may be?

A. Well, I was at one time, but I don't know if I would be now.

Mr. Kester: I have another map that I would like to have marked also, if I may, please.

The Court: Yes.

(The map referred to was thereupon marked as Defendants' Exhibit 3 for identification.)

Mr. Kester: Q. Do you also recognize Exhibit 3 as a soil map of the Meiss Ranch showing in different colors the different classes of soil?

A. We had a map of the Soil Conservation with different colors similar to this.

Q. Does that show the same information that this shows, orange as Class 2, red as Class 3, and so on?

A. Well, I think this orange is supposed to be some of the pasture ground, isn't it? [21]

Q. It shows on there as Class 2, does it not?

A. I don't know where it says that. Oh, yes; Class 2 is the red—Class 2 is the orange and red is 3 and blue is—

(Testimony of James C. Stevenson.)

Q. Do you recognize having seen that type of map before? A. Yes, yes.

Q. And you recognize that as a map of the Meiss Ranch, do you? A. Well, it looks like it.

Mr. Kester: We will offer it in evidence, also.

Mr. Tonkoff: May we see it, your Honor?

The Court: That is why we have the pre-trial order practice here, and we don't have this fooling around with exhibits. You will have to look at that later. For the present it is admitted. You will have to look at these exhibits at recess. Exchange them between each other.

Mr. Kester: May we have it put on the board?

The Court: All right. It is admitted.

(The map referred to was received in evidence and marked as Defendants' Exhibit 3.)

Mr. Kester: Can your Honor see that all right?

The Court: I am getting along all right, Mr. Kester.

Mr. Kester: Q. Mr. Stevenson, would you indicate with the pointer there on the big map above the outlines of the Meiss Ranch.

A. Well, the Meiss ranchhouse is probably down about in [22] here. It goes around like this.

Q. The heavy black line around the outside, does that indicate generally the exterior boundaries of the ranch?

A. That is right. This line is the outside boundary.

Q. Will you show us where the dike is that holds the lake back?

(Testimony of James C. Stevenson.)

A. The dike runs right across about here.

Q. On which side of the dike is the water stored?

A. The water is stored in this territory.

Q. East of the dike? A. That is right.

Q. Can you take a pen and mark there the word "Dike" so that it can be identified?

A. You want me to write it on there?

Q. Yes, just write it on the map. Show where the dike is. Now where is the boundary of the old lake bed area which was drained by means of that dike on the west?

A. The land that we reclaimed?

Q. Yes.

A. From this dike it runs way up in here like this. This is the boundary line here.

Q. That is where the water originally was before you reclaimed it; is that right?

A. That is right.

Q. Now the area within the bed of the old lake is what you [23] referred to as being peat land, I presume? A. That is right.

Q. Out in the middle of the old lake bed?

A. Along in here. This is the peat land here.

Q. You spoke of some heavy dobe ground up on the west side, up around the fringe of that. Would you indicate that. A. Right in here.

Q. And I believe you said there was about 400 acres of that; is that correct?

A. There was 400 acres in this spot here, and then I said there was a couple of hundred acres along the edge here like this.

(Testimony of James C. Stevenson.)

Q. So there is about 600 acres that is of that dobe consistency? A. That is right.

Q. Now, that dobe ground is sticky gumbo when it is wet, isn't it? A. It is.

Q. When it is dry, it bakes out pretty hard, doesn't it? A. That is right.

Q. Can you with a pen mark those areas that you have described as dobe ground and put an "A" in the center of the area that you have marked there for the dobe? A. You want me to put—

Q. Just mark it in the areas that you have indicated.

A. This is the dike here. You want me to put that on the [24] dike?

Q. Put an arrow pointing to where the dike is from whatever word you put there so we can find it later. Now up in the northeast part of the ranch, northeast of the lake, that is all sagebrush, isn't it?

A. This area?

Q. Yes. A. That is right.

Q. That is not under cultivation at all?

A. That is pasture ground up in there, and in here and around in there is all pasture.

Q. Down in the southeast corner that land was all rented out to Mr. Noakes, wasn't it?

A. Well, all this land right over in here was rented to Noakes, yes. This here and down to there, a strip like this, and then it jogged over here. Section 6, I guess it is.

Q. Now the water that comes into that lake

(Testimony of James C. Stevenson.)

comes down off the mountains around there, does it not?

A. From up on this side here, from the mountains, and then there is a creek runs in here they call Prather Creek.

Q. That ranch is situated at about what elevation?

A. 4250, or around that, 4235 or 4250. Around 4250.

Q. Around 4250 feet elevation?

A. That is right.

Q. The lake has no natural outlet, does it? [25]

A. No outlet to the lake.

Q. What? A. No outlet.

Q. So that that water in the summertime gets rather brackish and alkaline, doesn't it?

A. In the latter part of the season it does. In the first runoff, up until about the 1st of July, it is very good water, until it starts evaporating, and then it gets alkaline.

Q. Now in the early part of the season you never need the water anyway, do you?

A. No, not up until the 15th of June, anyway. The way we irrigate it, we flooded all the area early in the winter, and then pumped it out. That was the first irrigation. That is what we call pre-irrigation.

Q. You do that in the wintertime?

A. You do that in the wintertime, and pump this all out, and then farm the land afterwards. Then we don't have to irrigate only around the edges after that.

(Testimony of James C. Stevenson.)

Q. Drainage is quite a problem there, isn't it?

A. It takes quite a lot of pumping, yes.

Q. There are canals dug across the fields in several places to drain the water off, are there not?

A. Yes, there is a big canal—there is one across here and one down through here, and then there is another one through here and one across here (indicating on map), and they all run [26] to this spot here, drain to this spot here. There is three big pumps there to pump it out.

Q. Those are there to get rid of the excess water, are they not?

A. That is what they are for, yes, to keep the water table down.

Q. Because too much moisture will damage a grain crop during the growing season, will it not?

A. That is right.

Q. Now, did you ever spray while you were operating the ranch?

A. Never did. We tried a sprayer at one time on a little piece of land there the year before I left.

Q. You mentioned a figure of 3,000 acres of cultivated land. Had you ever had that surveyed, actually measured?

A. This territory here on this end here, I rented that to a party in '49 and they had it surveyed.

Q. Is that the map there that resulted from that survey? A. What was that?

Q. Is that the map there that resulted from that survey? I think that bears a date in 1949.

Testimony of James C. Stevenson.)

A. I don't think so. No, I don't think so. I don't think they made a map of it.

Q. When you give the figure of 3,000 acres is that based on that survey or is that just an estimate or what? [27]

A. No, it was made—I rented this land at so much an acre, and they paid me for 3,000 acres. But they claimed there was a little more than 3,000 acres in it.

Q. Actually there were about 3,300 acres; isn't that so?

A. They claimed there was something over 3,000 acres, but I let them have it for 3,000. We just called it a flat 3,000.

Q. So you are satisfied there is really more than 3,000 acres in cultivation? A. Yes.

Q. Now around the edges of the old lake bed here is a lot of alkali in that soil, is there not?

A. There is.

Q. And along the west side of the dike that holds the lake back that alkali is quite serious, is it not?

A. There is a strip along here, up in here, there is a strip that has some alkali in it, yes.

Q. That has never grown any crop at all, has it?

A. Right close to the dike, no.

Q. Yes.

A. That is in pasture along there.

Q. Yes.

A. There is a long strip in pasture about an eighth of a mile away from the dike.

(Testimony of James C. Stevenson.)

Q. About the only thing that ever grows there is salt grass, [28] isn't it?

A. That is right.

Q. Now, during the summer of 1953 did you observe that there was a patch of about 200 acres of pasture land in the middle of the old lake bed that was in potatoes?

A. It wasn't in the middle. It was right down at this end, way down here at this end (indicating).

Q. It is on the south side, but in the middle east and west? A. Yes.

Q. That is right. That is the best ground on the ranch, isn't it?

A. That is some of the best, yes. It is some of the best land.

Q. You spoke of an area of about 700 acres that was in quite serious weeds during the summer of 1953. Can you indicate with your pointer where that lies on the map?

A. Well, there is a big ditch goes right across here over to this point here, and then there is another ditch runs right down here this way. All this in here and in here is weed crop. There is a big ditch runs down through here.

Q. Would you take the pointer again and mark "Weeds" for that area that you have indicated so we can find it. Referring to that weed patch, as we will call it, did you ever have trouble there with weeds yourself? [29]

A. The last year we was there we had quite a

(Testimony of James C. Stevenson.)

ew weeds in this particular piece, and we had a little strip here——

Q. That area was always subject to weeds, was it not?

A. No, it wasn't always. There wasn't any weeds, as I say, just the last year we was there we had some weeds there, and every year afterwards it got worse.

Q. It kept getting worse? A. Yes, sir.

Q. As a farmer isn't it a fact what usually happens if an area goes to weeds it keeps getting worse?

A. It will if they don't spray for it.

Q. You never did spray yourself, I believe you said.

A. No, we never had any weeds on the ranch until this last year when we had this little area here with weeds.

Q. The area you have described as dobe ground up on the west side, did you ever get much of a crop off of that?

A. Oh, yes, we always—some years we would get more than others. It would all depend on how—that dobe ground, you have to be very particular about how you farm that. Three or four days makes a lot of difference in farming it.

Q. That dobe ground takes quite a bit of preparation before seeding, doesn't it?

A. Yes, it does.

Q. It needs a lot of plowing and harrowing?

A. Yes, you have to be a good farmer and build

(Testimony of James C. Stevenson.)

a good mulch [30] on it so you can hold the moisture and so it won't crack open. If you just scratch it in like you do some of this lighter ground, why, it won't grow.

Q. So the secret of getting a good crop on a dobe ground is in the soil preparation before plowing, isn't it? A. That is right, yes.

Q. Most of those wells that you spoke of during 1953 were used by the people growing potatoes and for the pasture land, were they not?

A. Well, I think there was spuds put in adjoining us on the ranch, and from what I understand—of course, I never rented it, but what they told me, that the spud man had the priority on the well.

Q. They had priority on the water?

A. That is right.

Q. Next to the potato man you had priority for your pasture land on the water, didn't you?

A. No; according to my agreement I could take water whenever I wanted to.

Q. You had preference over the grain part of the ranch, then, so far as getting water?

A. That is right.

Q. That is right, is it? A. That is right.

Q. You mentioned a couple of cows that got bloated. Do you [31] know where they picked up that grain?

A. Well, they ran all over this territory here. One of them died right over here, about there, and the other one was over in here (indicating).

(Testimony of James C. Stevenson.)

Q. Both of them were down in the area that you referred to as being very weedy, were they not?

A. Well, one of them was in the edge of the weeds, yes.

Q. And the other one was just on the other side of the weeds?

A. Over in this other grain.

Q. Do you recall the spring of 1953 as far as the weather was concerned?

A. Yes, I do. It was a very good growing season that year. There wasn't much frost, and there was quite a few rainstorms in June.

Q. It was a late, wet spring, wasn't it?

A. It was, yes.

Q. It rained practically all the month of May and the first half of the month of June, didn't it?

A. Well, I wouldn't say all the time. It rained quite a lot.

Q. You observed that there was difficulty in getting the crops planted because the ground was so wet it couldn't be worked, didn't you?

A. Yes. That is one thing, and then there was—it was [32] too late to pump the water off, too.

Q. In fact, you advised Mr. Barr to put some big paddle wheels on the tractors to keep them from sinking down in the ground, didn't you?

A. I told him he could drill it into that kind of ground. I asked him if he was familiar with the ground, and if he had these paddles on, I says, "You can drill it when it is right wet and it won't hurt this ground down in here."

(Testimony of James C. Stevenson.)

Q. That is in the bottom?

A. Yes, he could drill it in and it wouldn't hurt it. And then after he got the grain in he told me he wished he had taken my advice and that he would have got the grain in a little earlier.

Q. He did take your advice, didn't he? You saw him using the tractors with the paddle wheels on them?

A. I don't think he ever put them—he could have put them on later. I didn't notice that.

Q. You didn't notice much about it?

A. I believe he did put them on one.

Q. That was your recommendation?

A. Yes.

Q. He also consulted you, didn't he, about irrigating the land during the summertime?

A. He did, yes.

Q. And didn't you caution him about getting too much water [33] on and tell him that he had to be very careful and not get too much water on?

A. I asked him if he was familiar with irrigating, and I told him that this area up in here and this along here——

Q. You are referring now to the dobe ground?

A. Yes—that he could irrigate that, but not let the water get too far down in here because if he did it would make the grain stay green, as we call it, the second-growth come up, and it would be pretty tough cutting.

Q. And if by reason of the second-growth or

(Testimony of James C. Stevenson.)

third-growth the harvest was delayed there was a chance of getting caught by frost, wasn't there?

A. That is what I told him there would be, if he got water down in there.

Q. Now frost is a very serious problem at that elevation in that country, isn't it? A. It is.

Q. You can have frost almost any time of the year, can't you? A. You can, yes.

Q. There has been frost in the middle of the summer there, hasn't there?

A. Frost damage any time there, yes.

Q. When you get into October you are just gambling on whether you will get caught by the frost, are you not? [34]

A. After that time of year the frost wouldn't hurt. It would do you good. It would ripen your grain crop up so you could cut it.

Q. Yes, but if you were not ready to harvest, if the grain was still green, it could be killed by frost at that time, couldn't it?

A. No, you don't understand. On the second-growth your other grain would be ripe, but your second-growth comes up so you can't cut your other grain. Your second-growth don't make grain. It is just the green foliage that holds you back from harvesting the good grain.

Q. And the good grain, then, would be caught by frost if you were delayed to that extent?

A. That is right. It would make you late harvesting, and it might rain and spoil your grain.

Q. Then you might lose the whole crop?

(Testimony of James C. Stevenson.)

A. You might lose all of it, yes.

Q. This dobe ground that you spoke of up on the west end had never been prepared for irrigation, had it?

A. Yes, in a way. It hadn't been leveled to grade, but there was ditches where we used to just run the water.

Q. It was not level, was it?

A. It wasn't leveled to grade, no.

Q. If you put water on, the water would naturally just run off down to the lowest point there, wouldn't it? [35]

A. That is right. If you didn't take care of it and get out ahead of it and irrigate it right.

Q. You couldn't irrigate completely with water because it had not been leveled and ditched for that purpose, had it?

A. You would not get water on all of it, but you would get it on the biggest portion of it if you took and irrigated it right.

Q. If you irrigated that dobe ground, wouldn't the water just tend to run off down toward the bottom land below it?

A. If you didn't take care of it. If you just turned the water loose, it would be bound to go down on the lower ground, yes.

Q. There wasn't anything you could do there but turn the water loose, was there?

A. Well, I farmed it for several years, and it never was turned loose. I always had men out in front of it spreading the water, and when it got

(Testimony of James C. Stevenson.)

o far I would change it to another position. It was very easy to irrigate the most of it. There was some of this land up in this corner here that you couldn't irrigate very well, but this land down in here where I cautioned him, all of it could be irrigated with some work, but you had to get out there and work at it.

Q. This crop you had in 1947, that was the best year you ever had, wasn't it?

A. Yes, that is. I think we had more tonnage that year and a better price, too. [36]

Q. Do you remember what tonnage you had in any other year?

A. Oh, I don't know what tonnage I had. I don't even know what the tonnage was in '47, but I do know about how many cars we had in '47.

Q. Did you always have the same fields in the same kind of grain, or did you change around and rotate?

A. No, we generally planted barley in most of this country here year after year, and we planted oats up in here and oats in here, and some wheat down in here and down in here, and we planted rye over next to here.

Q. You don't know how many carloads you had in any year besides '47?

A. No, not right close, because we shipped a lot of grain out by truckloads, trucks, after that.

Q. So that your estimate there of how many pounds per acre of this and that is based on the year 1947, is it?

(Testimony of James C. Stevenson.)

A. Well, that is the first—you see, this was all tule land, all this here was tule land, and we only got it in '44. And this was '47 when we got this big crop, and that was the first year we had it all in, so we naturally would have the biggest crop on the virgin soil.

Q. And that is the year that you got the crops of the size that you have already described?

A. That is right. [37]

Q. You spoke about seeing some area that had been plowed up during the summertime. Where was that?

A. Well, he plowed up some of this area in here, about, I think, 60 acres. That was planted to alfalfa.

Q. That is up on the end of the dobe ground?

A. That is in the dobe ground here, yes. And then I think he plowed another strip along in here, and then down in here he plowed some more ground.

Q. Did you observe whether at the time that was plowed there was much of a crop there?

A. Well, I wasn't out in here. But there wasn't much of a crop here. And this here would have made a lot of pasture. There was a pretty good lot of feed there.

Q. That was in alfalfa, you say?

A. Yes. I don't think Clay planted that area there. I don't think he planted it to grain at all, because it was in the alfalfa. He could have planted it.

(Testimony of James C. Stevenson.)

Q. So there was no loss in grain production by reason of that part up in the dobe ground?

A. Not this up here. But I don't know if he even planted that to grain. I wasn't even up in that section there. I don't know if he even planted it to grain.

Q. So that part you are speaking of up in the north end, you can't say whether there was any loss in production by reason of the fact— [38]

A. No, I wouldn't say, because I was never up there.

Q. The only part, then, is down in the weed patch there? He plowed up some of that?

A. Yes. The reason I know about these places, see, this pasture land up in here is where my cattle was, and I could see this—I was a little more familiar with it. And along this part here, I didn't go in there. My hired man took care of the cattle out in there, and I didn't go out only maybe once or twice a year.

Q. This area that he plowed up down in the weed patch, there wasn't any crop there to speak of, anyway, was there?

A. No, there wasn't. It was very thin.

Q. So the mere fact he plowed it up didn't lose any grain production?

A. No, there wouldn't have been anything there anyway. He called it, like they do up in his country, summer fallow. He wanted to summer-fallow it and get ready for another year and get the weeds out of it.

(Testimony of James C. Stevenson.)

Q. So as a farmer you would have no criticism of his plowing up that area that had already gone to weeds, would you?

A. No, I wouldn't.

Mr. Kester: I think that is all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, what is the elevation of the water in the lake as compared to the terrain there on the farm property? Is it above the ground? [39]

A. The elevation of—

Q. Of the water. Is the water above the ground?

A. The lake?

Q. Is it higher than the farming property? Is the water diked up and is the water higher than the ground to the west there where you cultivate?

A. This water up in here is higher than that, yes.

Q. How did you put it in the lake?

A. You pump it in.

Q. When you want to irrigate, would you tell the Court how you would irrigate.

A. Right over here we have a lot of—we have three big pumps there, and we just open them headgates and let this water come back through this big canal here over to about right about here (indicating on map). Then there is another canal runs right down along there. We have a big 12-inch pump right here at the end of this ditch, and then there is—we lift this water up here, and it comes up to about this point. Then there is a

(Testimony of James C. Stevenson.)

big high fill there where the water can run up pretty near to this fence line here. Then you take the water whatever way you want to.

Q. When you want to stop irrigating what do you do? A. What? [40]

Q. When you want to stop irrigating, how do you shut the water off?

A. Just shut your pumps down.

Q. You shut it off so it won't come in from the lake, too, don't you?

A. Oh, you go out there and shut them—we have those flap valves on those big pumps, and you just close them down and that stops the water from coming back into the ditch, the big drain ditch. You see, we just turn as much water as we want into these drain ditches, and then start the pumps up and keep it pumped out.

Q. So you use those canals both for draining and irrigation?

A. That is right. You can use it either way.

Q. Are there canals all over the ranch so that you can drain it or irrigate it? A. Oh, yes.

Q. How many pumps do you have there, Mr. Stevenson? A. To pump out of the lake?

Q. Yes, and into the lake.

A. There is three big pumps over here, and down in here there is another 12-inch pump to pump out of the lake, for the land.

Q. How much water are those pumps capable of pumping per minute, do you remember?

A. I never figured that out. I think this 12-

(Testimony of James C. Stevenson.)

inch pump will pump about five second-feet or maybe more, and then those big sump pumps—I don't know how much they pump. They are 22-inch pumps, two of them is.

Q. Is that water in the lake fit for irrigation any time in the summer?

A. Up until the 1st of July it is good enough to irrigate with, yes.

Q. Was there any alkali in that water?

A. There is alkali in the water every year, but it picks up alkali after the big runoff.

Q. Do you irrigate after the middle of July?

A. No. Along the first part of July we irrigate, and that is all we have to irrigate.

Q. Would you tell the Court when does your harvesting season start, Mr. Stevenson?

A. We always start around the 20th of August.

Q. The 20th of August? A. Yes.

Q. Do you remember what time of the season Mr. Barr started harvesting in the 1953, what time of the year, rather?

A. I would say it was in September, around the middle of September, along in there sometime.

Q. If you don't harvest when the wheat is ready is there any danger of losing some of it from geese and ducks down there? [42]

A. Yes, there is.

Q. Did the geese and the ducks get a part of this crop in 1953? A. Yes, they did.

Q. Could you estimate about what portion of the crop they took?

(Testimony of James C. Stevenson.)

A. No, I couldn't. I couldn't answer that.

Q. When do the geese and ducks migrate in that area, Mr. Stevenson?

A. They start coming in in August, the ducks come in.

Q. Are there many of them?

A. Many of them?

Q. Yes. A. Millions of them.

Q. They are a hazard to the crops, are they, at that time of the year? A. Yes.

Q. Would you show the Court where the rye, barley, oats and grain were planted and the acreage, if you remember.

A. That Mr. Barr had?

Q. Yes, the year that Mr. Barr farmed it.

A. Well, I don't remember just—I know there was about 200 acres of potatoes down in this section. And this was all barley. I think he had oats back up in here. I don't know if he had—did you have wheat up in there, Clay? I think he had wheat up in that dobe ground. I don't remember just exactly where it was. I think he had a patch of wheat up in here someplace in one of these fields, but I don't know which one.

Q. Now, where the property was plowed up how bad were the weeds? In other words, had the weeds injured the crops?

The Court: Ten minutes recess.

(Short recess.)

Mr. Tonkoff: Q. Mr. Stevenson, could you state why the crops were plowed where Mr. Barr

(Testimony of James C. Stevenson.)

plowed them in 1953? In other words, were they weedy? A. What was it?

Q. Were the crops weedy where the ground was plowed?

A. I don't think they was. The grain was so thin they just plowed it up, the way it looked to me.

Q. Had it been planted to grain?

A. Yes, most of it.

Q. Do you know why it was plowed?

A. I can show you this section up in here. I don't think he planted that at all. But he did plow a long strip—I don't think he planted that, but down in here it had been planted to grain. I don't know if it come up or it was awful thin. He said he was going to summer-fallow it.

Q. About how many acres were planted to grain in 1953? By grain I mean barley, wheat, rye and oats. [44]

A. Oh, there was 200 acres up here, and then I don't know how much he left out here that he didn't plant. There must have been 2500 acres, anyway.

Q. How many?

A. There must have been 2500 acres.

Mr. Tonkoff: I see. That is all.

Recross Examination

By Mr. Kester:

Q. Mr. Stevenson, referring again to the water up on the dobe ground on the west end there, you

(Testimony of James C. Stevenson.)

never got any water up on the extreme west end of that, did you?

A. Yes, sir. There is a well right there we used to have. We put a pump in it and irrigated. Then when we was irrigating this pasture land we used to let—there was a ditch across there, and we used to let the water come across the pasture land and then onto this land.

Q. You spoke about a pump down in the main ditch across the lake bottom there and pumping water up onto the dobe ground. Now the pipe line to take that up only went about a third of the way up there, didn't it?

A. The pipe line went about a third of the way, and then there was a fill built up.

Q. There wasn't any pipe or ditch on that fill, was there, when you were there? [45]

A. Not when we was there. We was just building that.

Q. You never got to use that for irrigation purposes while you were there, did you?

A. Not the fill. We did the pipe line up to the fill.

Q. Yes, but that only came up to about a third of that dobe ground, didn't it?

A. Well, if you go a third of the way across here, you could then, yes. The ditches ran back around this way, and you could get most of it and then irrigate this other from these creeks and this little pump up there. That is the way we did it. We

(Testimony of James C. Stevenson.)

irrigated practically all of it. But you couldn't irrigate all of it from this big pump down there, no. You couldn't do it.

Q. I see. You mentioned about your harvest usually started about the 20th of August. Is that right?

A. That is right, our early grain. We start planting our grain early, and the first grain that we planted would be ripe quicker and we would start on that.

Q. So in order to get to harvesting by the 20th of August you would have to have it planted by the middle of April, wouldn't you?

A. No, about the 1st of May. You take 90 days, you have barley and oats.

Q. Doesn't it take more than that for barley?

A. No. [46]

Q. You usually had your planting done by the 1st of May; is that right?

A. No, no, not every year. We planted up to the 1st of June. The last year I was there the dike broke over here and this land all got wet, and we planted that into oats up until the 1st of July and made three tons to the acre on oats after that.

Q. You can't harvest it before it is ripe, can you?

A. No, you can't harvest it for grain, no. That is right.

Q. If it isn't ripe by August 20th you just have to wait, don't you?

(Testimony of James C. Stevenson.)

A. That is right. But we generally start—we wouldn't start all the rigs by the 20th of August. We would start a couple, and then every few days we would put on another rig.

Mr. Kester: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Is that dobe land capable of producing as much as the other land, Mr. Stevenson, if it is properly farmed?

A. Yes, it will if you farm it right and get plenty of water on it.

Mr. Tonkoff: That is all. [47]

Recross Examination

By Mr. Kester:

Q. That year that you planted up to July, you cut that off for hay, didn't you? That didn't thresh grain?

A. Well, that is the year that I sold the ranch and my boy—Mr. Hofues had him cut that for hay, yes.

Q. So you didn't make any grain on that?

A. No, but it would grow in a short length of time. That is the point I was showing you.

Q. But it didn't ripen? A. Oh, no.

Mr. Kester: That is all.

(Witness excused.) [48]

JAMES C. STEVENSON, Jr.

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Stevenson, the Mr. Stevenson that was on the stand is your father?

A. That is right.

Q. Where do you live?

A. I live in Dorris, California.

Q. How far is that from the ranch we have been talking about?

A. Oh, about 11 or 12 miles.

Q. How long have you lived in that area?

A. I moved over there in 1945, in the spring, early spring.

Q. What has been your occupation during your life?

A. I have been a farmer all my life.

Q. What kind of farming were you doing?

A. Well, principally grain and livestock, some potatoes.

Q. Did you ever manage this ranch, the Meiss Ranch?

A. I was foreman on it for my father from 1945 until 1948, the fall of 1948, and I was gone one year and then come back.

Q. When did you finally leave?

A. I was there after Mr. Hofues bought it, and

(Testimony of James C. Stevenson, Jr.)

I worked 18 months for him, or approximately that.

Q. When did Mr. Hofues and Mr. Kirschmer purchase the property? [49]

A. In August of 1952.

Q. I forgot to ask you about how many acres is in that ranch?

A. There is 13,160.

Q. How much of it is tillable land?

A. You mean at present, right now?

Q. In '53.

A. Well, there was approximately 3500 acres that was farmed in grain, and then there was three or four hundred acres that my sister had rented over on the other side that was tillable.

Q. What was your sister's name?

A. Mrs. Noakes.

Q. Would you point out on that map—I think that is Exhibit 2—where her property was or where she was farming?

A. Well, it is right over in this area here, half of Section 6.

Q. How many acres was she farming there?

A. In '53 she had about 800 acres, I think.

Q. Did you observe the crops on her property in 1953?

A. I was over there a number of times.

Q. Is it necessary to irrigate crops in that area.

A. It certainly is.

Q. Before you go any further, would you briefly describe what development was made of that

(Testimony of James C. Stevenson, Jr.)

ranch up to 1953 where the lake is and what you did. [50]

A. Well, when my father bought the ranch all this area in here was a big lake, and tules and things. We went in and built a dike—that is not a very good map—maybe I can find the dike. Oh, yes. Here it is. We built a dike right across here and put some pumps in to pump this water out up into this higher area, and then we broke up the tules, plowed and burned them up, and put numerous drain ditches all through there so we could keep the water down below a certain level on the ground.

Q. What is the elevation of the area where the water is pumped in as to the land west of it or where the farm property is?

A. You mean where they pumped water over in this lake here?

Q. Yes.

A. Oh, it is approximately 4250, or something like that.

Q. What is that?

A. That is approximately 4250 feet elevation.

Q. Is the water above the top of the ground to the west there?

A. It is several feet, yes; about 7 or 8, or something like that.

Q. How high is that dike?

A. Oh, it is approximately 8 feet high, I believe.

(Testimony of James C. Stevenson, Jr.)

Q. Would you show his Honor where the canals are on that property. [51]

A. Well, there is a canal goes right across here up on this side, right straight across the middle. That is where the pumps are on that end and on this end. And there is one right here, and a big pump right there, and there is one up above about there, and then one right along this fence line, one across this way, and there is one runs up to this line and one runs right across there. There is a drain canal right up alongside of here. I believe it ends right about here (indicating on map).

Q. What do you use those canals for, Mr. Stevenson?

A. Well, in the spring of the year when the snow and ice melts off of these high mountains back here, and the rain comes, it runs down on this area here, and we used to have to drain the water off. We would pump this water over into this lake, and we used it for drainage. Then in the summer time we would use them to irrigate with, too.

Q. How did you use those to irrigate with? Will you just explain the mechanics of it.

A. Well, we put some headgates right in over here for these pumps, and then we would let the water back through the pumps. And right down ahead of this ditch here is another pump, so we could turn water into this ditch here and bring it right down to this pump and pump the water back into the high-line ditch that we had up around

(Testimony of James C. Stevenson, Jr.)

here and irrigate this area. This pump over here pumped back up—there was a pipe line led there, and then a fill built, and we could irrigate all this area here, all the pasture and everything. And a well right up in this corner here that supplemented a little higher area along here that you couldn't get from this pump. These three creeks in here ran down across the meadows, and there was a ditch there that you could take that water and scatter it along anywhere you wanted it. You could irrigate that. Then over in here was a big flat area, and we could pump water into there and up in here we had a cut through, a little ditch right around this area here, and right back here. You see, the lowest part of the property is right square in the center of this. It sloped this way and sloped this way, so it kept the water out of the higher edges where it ran down. Your drainage ditches, then, is in the center down here, and these pumps in the center of it pumped out so it wouldn't get too wet in there.

Q. What is the capacity of those pumps when they are all pumping?

A. Well, the way I had it figured, with all the wells and these irrigation and drainage pumps, they would pump about 100 second-feet.

Q. How much is that in gallons, Mr. Stevenson?

A. I think it is approximately 450 gallons to make one second-foot.

Q. Per minute? A. Yes. [53]

Q. How long does it take to irrigate that prop-

(Testimony of James C. Stevenson, Jr.)

erty when you operate the pumps at full capacity?

A. Well, it wouldn't really take so long if you had crew enough to handle it, but you have to irrigate it according to when the grain is big enough to stand it. And we would start to irrigate along—some grain would be planted early and some later. You start on the early grain and work right through on the older grain.

Q. What kind of land is that in the area where they were farming there?

A. Well, I think we have a map here of the classification that says this general area in here is class 1 land, this Class 2, and Class 3 along up in this meadow, and this is dobe land. There is some very poor land over here under the lake. I don't know just exactly what the classification is. Then there is brush land, which is classified as No. 4 land, just wet land. It needs drainage in it.

Q. Were you operating the ranch or managing the ranch in June of 1953? A. I was.

Q. And particularly on about the 10th of June would you tell us what the condition of the crops was.

A. They was in pretty fair shape. All the crops were planted by then, and they was in—I would say in good shape, because we had quite a lot of moisture, rain, which helped. [54]

Q. How much had they grown?

A. Well, the early grain probably was five or six inches high, and the older grain was just barely

(Testimony of James C. Stevenson, Jr.)
beginning to come through. The last grain, they had only been through planting a few days.

Q. When Mr. Hofues took that over, did they employ you?

A. Yes, I took over the managership the day that they took over from my father, August 7th, I believe it was, 1952.

Q. You continued to work on through 1953?

A. That is right, to January.

Q. When did Mr. Barr come to the Meiss Ranch?

A. Mr. Barr leased this farm and took possession May 8th.

Q. At that time how many acres were planted?

A. Oh, just a rough estimate, around 1200 acres in this lower end here planted.

Q. What were the total plantings that he made? Do you have something there—

A. Yes, he had a map for us when I was the manager of the ranch there that I made an estimate off of. I don't know where the map has disappeared to. But I had figured he had about 250 acres of rye, about 1200 acres of barley, 132 acres of wheat, and around 1,085 or 1,086 acres of oats.

Q. Now, when did you notice any change in the condition of these crops?

A. Well, when he got his crops planted he left. He didn't show up around there very much until harvest time. Once or twice is all he showed up.

Q. Do you recollect when Mr. Welch and myself and Mr. Barr came to the ranch?

(Testimony of James C. Stevenson, Jr.)

A. Yes. That was approximately the 1st of July.

Q. At that time what was the condition of the soil where the crops were?

A. The soil and the crops on this higher ground was awfully dry, and the soil was cracked open pretty much.

Q. Was anything said in your presence to Mr. Barr about irrigating?

A. Yes, they asked him if he would irrigate.

Q. What is that?

A. The fellows asked him if he would irrigate, and he said he would have a crew down there the next Monday, or something on that order.

Q. Did he bring a crew there the following Monday?

A. He never showed up for about three weeks.

Q. At the time he showed up what were you trying to do?

A. I was trying to irrigate along this upper edge here. I called Mr. Hofues and Mr. Kirschmer, and Mr. Kirschmer finally said, "Well, why don't you irrigate what you can?" I said, "All right, I will." So I was trying to irrigate some along the upper edge here in this worst stuff.

Q. What did Mr. Barr order you to do when he arrived there? [56]

A. He told me he didn't want any more water on it.

Q. At the time he told you he didn't want any

(Testimony of James C. Stevenson, Jr.)

more water on it would you describe what the condition of the crops was then.

A. They was very badly in need of water all over on the higher edges. If he had irrigated them, it would have built the water table up a little more down in the center part there, and probably would have made a better crop of grain down in there, even.

Q. Aside from the grain crops were there any other crops growing there?

A. Yes, here was two fellows had 100 acres apiece of potatoes right down in this corner here.

Q. Was there ample water during the entire summer to irrigate those crops?

A. Yes, there was.

Q. Would you tell us what you used the wells for, Mr. Stevenson.

A. Well, the wells was used to irrigate the meadows and potatoes and grain. And then, of course, we used the lake—we always used the lake water first, and then these wells was for later in the season when the creeks and things got low.

Q. Could you also use the wells for drainage?

A. Yes. In 1953 I drilled a couple of test wells, drain wells, over on this big canal over here, and put water down them, and the engineer measured one of them for me and he said it was running 3950 gallons per minute down. [57]

Q. You could pour in as much water as you could take out of them? You could use them either

(Testimony of James C. Stevenson, Jr.)

for pumping for irrigation or use them for drainage?
A. That is right.

Q. Now what was the condition of the crops as far as weeds was concerned, Mr. Stevenson?

A. Oh, we had quite a little weedy area on the southeast side there; approximately 300 acres, or something like that.

Q. In what kind of crops?

A. Well, there was rye and then there was a small strip here of about 70 acres of some imported barley that my father had acquired. He was trying to test that there and grow it there. He had about 70 acres of it right along in there.

Q. What was the extent of the weeds? Had they choked out the crops entirely?

A. Well, as the season goes along, why, the weeds get larger and they will choke out the crop.

Q. Did they in this instance annihilate the crops?

A. Oh, yes. They took practically all of it.

Q. Did Mr. Barr plow any of the crops that year?

A. Yes, he plowed, oh, approximately 100 acres right in here, plowed the crop up. Then he plowed some up in this top field, and then he plowed some along the back side here. Some of it he didn't even plant. Then he plowed up over here along the back side there. [58]

Q. What was the condition of the crops where he plowed?

A. Well, this one area was weedy, and this area

(Testimony of James C. Stevenson, Jr.)

up in here was burned up, dry, got about three or four inches high and practically burned up. This area in here had some alfalfa and some wild oats and stuff in it. He plowed that up.

Q. Now, when the weeds come up what is the customary thing to do?

A. As a general thing in that country and area down there everybody sprays them when the grain is very small and the weeds begin to show, they spray it and kill the weeds.

Q. What time of year do you usually spray it?

A. Oh, most generally in the latter part of June or the first week or so of July.

Q. Did Mr. Barr do any spraying there?

A. He sprayed just a little on the ditch bank, is all I ever saw.

Q. Will you point out on the map what area he sprayed?

A. It was this first ditch bank that went across here, and he sprayed just a little ways down this way, this ditch right here.

Q. How much of the ditch bank did he cover?

A. Oh, he just made one pass right across this way with an airplane. And I think they figure about 60 feet they make to a swath with an airplane.

Q. What portion needed spraying that was not sprayed, how many acres?

A. There was probably about 300 acres right in here.

Q. Was that 300 acres ever harvested?

(Testimony of James C. Stevenson, Jr.)

A. Just spots of it.

Q. Now, could you grow crops on that ranch in that immediate vicinity without irrigation?

A. Well, you can grow a dry land crop, but it doesn't amount to very much in that country.

Q. How high do the crops grow, from your observation in previous years?

A. Well, normal crops run waist to shoulder-high.

Q. This particular year in comparison what was the condition of your sister's crops that were on the part of the ranch there that she had?

A. I believe in this year she had a patch of irrigated wheat there. You see, only part of this was irrigated. There was a well in that corner, and about 105 or 110 acres was leveled up, and then she had this dry land wheat here. It didn't amount to very much. And she had some wheat in here and some potatoes. The wheat and potatoes was fair. And then they had some barley back in here. Then the rest of their ground was alfalfa and clover and potatoes.

Q. What kind of production did she get, do you know? [60]

A. I don't know exactly, but I would presume somewhere around 2500 or 3000 pounds per acre on the wheat and barley.

Q. Can you approximate from your experience in farming that property about what the production is per acre in pounds for barley, wheat, rye and oats?

(Testimony of James C. Stevenson, Jr.)

A. Well, on this good irrigated ground over here it runs about 3000 pounds of barley per acre, and approximately the same for oats. Your rye will run about twelve to fifteen hundred pounds, and your wheat will run around 2500 pounds per acre.

Q. When was the harvesting season beginning in 1953?

A. Oh, I think most everybody else started around the 20th of August.

Q. When did Mr. Barr start harvesting?

A. Well, somewhere between the 10th and the 15th of September.

Q. Between the time this harvesting started and the time that he started to harvest was there any loss occasioned by ducks and geese?

A. Oh, yes. The ducks and geese come in from the north along the middle of August——

Mr. Kester: Pardon me, your Honor. I don't like to interrupt. We haven't been objecting and ordinarily would not, but there is no allegation in this case of any loss by reason of ducks and geese. I mention it only so that it won't be thrown up later that I failed to object when the evidence was offered. It is wholly irrelevant to the case. [61]

The Court: Objection overruled.

Mr. Tonkoff: Go ahead.

A. There was quite a lot of ducks and geese come in along the middle part of August. I spent most of my evenings herding ducks and geese out of these drain ditches, because they would go right in them and then work back up.

(Testimony of James C. Stevenson, Jr.)

Q. Did they get part of the crop in spite of your efforts? A. Beg pardon?

Q. Did they get part of the crop in spite of your attempts to keep them out?

A. I still don't understand.

Q. Did the ducks and the geese take part of the crop in spite of your efforts?

A. Yes; they took strips all along, yes, south of these drain ditches.

Q. About how many acres would you estimate was lost by reason of ducks and geese?

A. It would be hard really to estimate it. There is about eight miles of drain ditches. Some places they would work back two or three hundred feet, and some places further. Probably 60 or 70 acres.

Q. Would you describe how the grain was harvested?

A. Well, I would say it wasn't harvested in a very good——

Q. Tell us how it was done, Mr. Stevenson. [62]

A. They moved along too fast with their machines, and that light a stand of grain they had pickup reels on where they couldn't get the grain back in there, and in the course of that they would run over the top of a lot of it and leave it there. And crowding these machines too heavy put a lot over the rear end of the machines.

Q. How many machines were used in harvesting? A. There was six.

Q. Who was operating them?

A. Oh, Barr's hired men.

Q. What? A. Mr. Barr's hired men.

(Testimony of James C. Stevenson, Jr.)

Q. How old were they?

A. There was some young boys there, mostly. I think his father-in-law was running one machine, and most of them was young fellows.

Q. How old were they?

A. 19 and 20; something like that age group.

Q. Was there any wheat or grain left on the ground after it was harvested?

A. Yes, there was quite a little that wasn't cut, and quite a little that went through the machines that they didn't save.

Q. Can you approximate about how many pounds per acre were not harvested or were harvested in such a manner that the grain was left in the fields? [63]

A. Oh, I could probably say five or six hundred pounds per acre.

Q. How was the wheat hauled to market?

A. Well, it was hauled in the ranch trucks and things there.

Q. What is the proper and customary manner in hauling it to market?

A. We always hauled it in trucks to wherever they loaded it to market, and not try to overload the trucks so it would run all over and scatter down the road.

Q. Did you use tarps?

A. Sometimes. Sometimes we just didn't fill the trucks quite so full.

Q. Where was the wheat hauled, Mr. Stevenson?

A. Part of it was loaded to the railroad at

(Testimony of James C. Stevenson, Jr.)

Macdoel, and I think there was some taken to the elevator or the warehouse over to Merrill.

Q. How far is this ranch from the main traveled highway there?

A. I counted up here on sections. About five and a half miles out to the ranchhouse.

Q. From the ranch to the main traveled road was there any wheat or grain on the road?

A. Oh, there was quite an excessive amount.

Q. Can you describe it a little more definitely?

A. Well, from where they loaded the grain out of these buildings until you get out a ways it covered the road an inch or so deep, and then after you got farther out, why, it got lighter all the time.

Q. How many times, on how many occasions, was Mr. Barr down there from the time he took over the ranch until it was harvested?

A. Well, he was there quite a little bit, a week or two weeks, something like that, in the spring when he put the crop in. And he was there, I would say, about three times on the ranch during the summer, the growing season. And then he was there a part of the time during harvesting.

Q. When was the wheat first ready to be harvested?

A. There was some of the wheat that you could start, probably about the 15th or 20th of August. They didn't start until later, but it could have been harvested earlier.

Q. Was all the other grain ready to be harvested at that time?

(Testimony of James C. Stevenson, Jr.)

A. No, not all of it, but there was some that you could start on to work and harvest that part that was ready, and gradually work right on to the other as it got ready.

Q. Would you describe the condition of the soil at harvesttime as to dryness?

A. Well, in all this west side over here, on this heavier land, it was all cracked—the ground was all badly cracked. There wasn't much grain on it, because it hadn't had any [65] water. And the lower part down in here should have had a little more sub up from the bottom.

Q. Were you present during the harvest season, or just before the harvest season, when moving pictures were taken of the crop?

A. Yes. I was.

Q. Would you just describe over what portions moving pictures were taken of the ranch?

A. Well, the center road goes in right from the center here, and we went in there—this patch of potatoes was along here, and we went along the edge of the potatoes. And they started taking shots all up along this side here, up in the wheat. He had a little patch of wheat, 70 acres, up in this corner here, and this was oats. He took pictures down along this center dike, and out to here, and back into the potatoes and the grain. I think that was about the general area; just made kind of a general circle all around to get an equal picture of all of it.

(Testimony of James C. Stevenson, Jr.)

Mr. Tonkoff: Your Honor, this afternoon may we run these pictures?

The Court: I want to get some of these witnesses out of the way.

Mr. Tonkoff: Q. Did you ever mention to Mr. Barr about the dryness or lack of water on this property?

A. Oh, yes. I told him before we got done planting grain and things that he would have to irrigate a lot of that grain, and when he got ready I would show him where to make his ditches. We make little, small ditches, and use them to run a little water out over the top of the ground and sub it up. I told him I would show him where to make those, and one thing and another, and help him. I had arrangements made for a big ditcher from the irrigation district to use.

Q. Do you know the market price of barley, rye, wheat and oats in 1953?

A. I know what the grain on the ranch was sold at.

Q. You had an interest in that crop?

A. That is right. I had a percentage.

Q. What did barley bring in 1953?

A. \$3.10 a hundred.

Q. What did rye bring?

A. \$1.90 a hundred.

Q. That is a hundredweight?

A. That is a hundredweight.

Q. What did wheat bring?

(Testimony of James C. Stevenson, Jr.)

A. I have part of the contracts right here. I could read them off of that, I guess.

Q. You have part of the contracts?

A. Yes.

Q. Under which the grain was sold?

A. Yes. I don't have the contract for the barley, but I have the wheat and oats right here. Let's see. Wheat, \$3.15 per hundred. [67]

Q. What?

A. \$3.15 per hundred. Oats was \$2.30 per hundred.

Q. In your opinion as a grain farmer, and having farmed there most of your life, would you say this property was farmed in a good and farmer-like manner?

A. I would say it was very poor according to the customs of the country.

Mr. Tonkoff: That is all.

Cross Examination

By Mr. Kester:

Q. May I see this contract that you were referring to? A. Certainly.

Q. This copy of contract refers to wheat at \$3.15 and oats at \$2.30; is that right?

A. That is right.

Q. It doesn't mention the barley?

A. Well, no. I have lost the other part of it somewhere. I had the barley contract, but I couldn't find it.

(Testimony of James C. Stevenson, Jr.)

Mr. Kester: May we have this marked and kept here?

(The contract referred to was thereupon marked as Defendants' Exhibit 4 for Identification.)

Mr. Kester: Q. As a matter of fact, the \$3.10 price that you mentioned for barley was for brewing barley, wasn't it? A. That is right.

Q. For feed barley it was considerably less, wasn't it?

A. I believe it was \$2.85. I am not sure.

Q. Wasn't it \$2.35 for feed or grade barley?

A. I couldn't be sure what it was. I can't remember. I know all the barley off the ranch went as brewing barley that year.

Q. You say all the barley went as brewing barley?

A. That is what Mr. Kirschmer told me, that every bit of it went into brewing barley.

Q. You don't know, then, about the various discounts that were made from the three-dollar price that you mentioned?

A. Well, it is marked on the contract it would be according to the scale and discount.

Q. Did you participate in the settlement for the crop?

A. No, I was gone from the ranch before that crop was finished.

Q. You signed the original contract which you have produced there, you signed that on behalf

(Testimony of James C. Stevenson, Jr.)
of Hofues and Kirschmer, didn't you, for your half? A. That is right.

Q. And Mr. Welch signed that on behalf of Tonkoff and Herman for their half-interest? [69]

A. That is right.

Q. You had worked for Hofues and Kirschmer in the fall of 1952, had you?

A. That is right.

Q. They bought the place about harvesttime in 1952?

A. I believe it was August 7th that we took possession for Hofues and Kirschmer.

Q. That was before harvest, then?

A. Yes.

Q. In 1952? A. That is right.

Q. Then did you work there during harvest?

A. Yes, I managed the ranch from August 7th until—I left on October 11th of 1953.

Q. You made a new arrangement with Hofues and Kirschmer starting with the first of 1953, did you not?

A. I made an arrangement—I have that arrangement right here. I made it in March, I believe it was.

Q. In March of 1953?

A. I believe that is when it is. I will look the date up to be sure. March 12th, 1953.

Q. Is that a written contract that you had with Hofues and Kirschmer?

A. Written agreement, yes.

Q. Could we have a look at it? [70]

(Testimony of James C. Stevenson, Jr.)

A. Certainly. (Handing document to counsel.)

Q. Under this agreement you were to get \$500 per month and expenses plus 5 per cent of the net profit of the crops and the pasture, after deducting all operating expenses, plus an additional sum if the property was sold. Is that correct?

A. That is right.

Mr. Kester: May we have that marked, please?

(The document above referred to was thereupon marked Defendants' Exhibit 5 for Identification.)

Mr. Kester: Q. So that you had an interest in the crop yourself to the extent of 5 per cent of the net profit; is that right?

A. That is the interest I had in it.

Q. And you anticipated when you entered into that staying on with the owners indefinitely, did you not?

A. That was the agreement, unless they sold the ranch, and then he said he would recommend me to go on with the other people if they preferred it.

Q. Now in May of 1953 Mr. Barr arrived and then you learned that he had a lease on the ranch for 50 per cent of the crop, did you not?

A. That is the understanding I had. I never did get to see the lease. He wouldn't produce it.

Q. You were advised by the owners, however, that he had the [71] lease? A. Yes.

Q. What arrangement was made as far as you were concerned during Mr. Barr's lease?

A. There was no change of the arrangement at

(Testimony of James C. Stevenson, Jr.)

all. I was to manage the place, and Mr. Barr would farm his part just the same as the other lessors did their part.

Q. You say he farmed his part. What part do you mean?

A. He had the grain part of it. The potato men had their part leased, and Mr. Stevenson, my father, had the pasture all leased, the meadows.

Q. What was your function, then?

A. I was to see that everybody got along and got their part of the water, checked all the crops that was harvested off of there, and have a record of the sale of the crops and do some developing work at the same time.

Q. You regarded yourself as still the manager of the place, did you?

A. That is what my agreement says.

Q. The agreement with the owners?

A. Yes.

Q. You spoke about seeing that everybody got water. Was it your understanding that the potato growers had priority on the water?

A. They had preference to the water. [72]

Q. And your father's pasture also had prior rights to the water over the grain land?

A. I never understood that. Everybody had their equal share of water when they needed it, only for the potato men. They got preference on the water, because they had to irrigate at a certain time. They couldn't wait two or three days to irrigate their crops.

(Testimony of James C. Stevenson, Jr.)

Q. You had started the planting yourself in the spring of 1953, had you not? A. Yes.

Q. How much did you get planted yourself?

A. Oh, approximately 1200 acres.

Q. Could you indicate on the map where that was?

A. I think on the lower part, along the back of it. The potatoes was right along in here (indicating), and most of the lower part.

Q. The southeastern part?

A. It was on the southeastern part of the farm here, you might say.

Q. The southern part?

A. There was a little bit right up in here that wasn't quite done when Mr. Barr took it over.

Q. Had you planted any of the dobe ground on the west end?

A. I think I planted about one per cent there with a little wheat, which just got started there when Mr. Barr took over. [73]

Q. How much did you plant up in that end?

A. Oh, I couldn't tell you for sure. Maybe 10 or 15 acres when he moved up in there. He just moved up in the evening.

Q. You say you only had 10 or 15 acres planted there?

A. As near as I can remember, yes.

Q. You gave some figures on the acreage that you say had been planted to various grains. Where did you get those figures?

(Testimony of James C. Stevenson, Jr.)

A. I got them off of a map that Mr. Kirschmer has at the present time.

Q. Is that the map that is on the lower end of the blackboard there?

A. No, I don't think so.

Q. Will you look at that map, please.

A. Yes, I have already looked at it.

Q. Do you recognize ever having seen that map before?

A. No, I don't think so. I don't think I ever saw that map before, or anything like it.

Q. Now, as I recall, you testified that Mr. Tonkoff was down there about the 1st of July; is that correct?

A. Approximately, yes.

Q. And you said you had a conversation there and that Mr. Tonkoff asked Mr. Barr about irrigating. That was about the 1st of July, wasn't it?

A. Yes.

Q. And, if I remember correctly, you said then that Mr. Barr [74] was gone for three weeks; is that right?

A. It was three weeks after that before he ever come back on the place that I ever saw.

Q. That would make it about the 21st or 22nd of July?

A. Somewhere in that neighborhood, yes.

Q. It was at that time that he told you he didn't want any more water?

A. That is right.

Q. Is it your testimony that the grain was ready to harvest in the middle of August, 1953?

(Testimony of James C. Stevenson, Jr.)

A. Some of it was ready on the 20th, the 15th or 20th of August, to start on.

Q. Don't you recall that everybody was standing around waiting for the grain to ripen so that they could start harvesting and it was not ready?

A. Yes, I was waiting for all of it to harvest, and there was some ready before the 20th.

Q. Do you recall that some was cut too early and had to be laid out to dry before it could be shipped?

A. Well, that is kind of customary in that country. You hit green spots that you have green grain. Every once in a while you get that.

Q. You recall that did happen in 1953?

A. Yes. I think mostly all the trouble with drying was over in these weeds.

Q. You don't recall any of the first cuttings that had to [75] be stored because it wasn't dry enough to ship?

A. No.

Q. You spoke about tarps on the trucks. As a matter of fact, there were no tarps as a part of the ranch equipment there, were there?

A. I think there was tarps there, yes.

Q. You think there was? A. Yes.

Q. Who took these movies that you spoke of?

A. Mr. Tonkoff.

Q. Did you have anything to do with the taking of them?

A. No, I just stood around and watched where he took them, stayed out in the field.

Mr. Kester: I think that is all.

(Testimony of James C. Stevenson, Jr.)

Redirect Examination

By Mr. Tonkoff:

Q. Have you seen those movies since they were taken, Mr. Stevenson?

A. I saw them last night for the first time.

Q. Do they represent the condition of the ground and the cracks that are disclosed in these movies adequately and properly?

A. Yes, I think they do.

Q. Incidentally, how wide were those cracks?

A. Oh, they averaged all the way from an inch to three or four inches.

Q. How long would they be?

A. Oh, some places they would be 20 or 30 feet long.

Q. What was the condition of the soil at that place?

A. It was very dry; extremely dry.

Q. And the condition of the grain?

A. There practically wasn't any.

Q. How high was the grain in those dry spots, Mr. Stevenson?

A. Oh, probably halfway to your knees.

Q. Do those movies reflect that?

A. I think they do.

Q. How high was the grain where there was water along the ditch bank?

A. Waist-high, approximately.

Q. Where was the dobe soil on that ranch, Mr. Stevenson?

A. It was this little area up in here, and some

(Testimony of James C. Stevenson, Jr.)

little area down along the lake, and a little dobe where it runs up the hill. It is not regular; just irregular along.

Q. What was the production on that portion of the ranch in comparison to the other if the soil was properly cared for and cultivated?

A. I didn't get that.

Q. Was there any difference in production on the dobe land and the other land if it was properly cared for? [77]

A. There was practically no crop on this up along here this year.

Q. If it was properly irrigated and cultivated, would it have produced as much as the other part of the ranch?

A. Well, approximately, yes.

Q. Now, what is the difference between that feed barley and brewing barley?

A. Brewing barley has to weigh 50 pounds to the bushel and it has to be of a different type. It is a two-row principally in that country. Hannehen barley is the name of it.

Q. Does irrigation have anything to do with whether it becomes brewing barley or feed barley?

A. Not necessarily.

Q. What causes the difference in weight?

A. Well, it could be frosted a little bit, and not get enough moisture and shrivel it. Heat could do it.

Q. What did it this particular year?

A. Beg pardon?

Q. If some of this barley didn't go as brewing

(Testimony of James C. Stevenson, Jr.)

barley, what would make it go as feed barley?

A. I would think it was short of moisture.

Q. Is that fresh water in that lake?

A. It is all snow water, comes off of these mountains.

Q. Are there any fish in that lake? [78]

A. Yes.

Q. Will fish survive in alkaline water, where there is alkali in the water?

A. I wouldn't think very long, and especially those fresh water shrimp that are in there in the spring and summer.

Q. Does that lake ever dry up?

A. Yes, it dries up. Well, this year it is dry now. It dried up along the first part of August.

Mr. Tonkoff: I think that is all, your Honor, except if you would allow us to use this witness this afternoon, after we set up the movies. It will only take about ten minutes to have him identify the different parts of the ranch.

The Court: All right. Start another witness, Mr. Tonkoff.

(Witness excused.) [79]

MARGARET E. STEVENSON

was produced as a witness in behalf of Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. You are the wife of Mr. Stevenson, who was just on the stand?

(Testimony of Margaret E. Stevenson.)

A. Yes, that is right.

Q. What has been your husband's occupation, Mrs. Stevenson? A. Farming.

Q. How long have you and your husband been engaged in farming? A. Well, 19 years.

Q. You have been married 19 years, have you?

A. Yes.

Q. Where did you live between '45 and '53?

A. At the Meiss Ranch.

Q. Would you describe the crops on June 10th of 1953?

A. Yes. They were coming along very good.

Q. Incidentally, do you have any recollection of the particular date of June 10th?

A. Do you mean——

Q. Do you remember that date?

A. Yes, I do.

Q. How did you happen to remember it, Mrs. Stevenson? [80]

A. Well, Mr. Welch called and asked how the crops were doing, and we were very pleased that they were coming along.

Q. Do you know where Mr. Welch called you from?

A. It was up in, I think—up north some place.

Q. From Spokane, wasn't it?

A. I think so.

Q. Did he talk to you concerning the condition of the crops? A. He did.

Q. And you had lived on the ranch there all year and previous years? A. Yes.

(Testimony of Margaret E. Stevenson.)

Q. Had you had an opportunity to observe the condition of the growing crops? A. Yes.

Q. Would you tell his Honor just what the condition was and about how high they were then?

A. Well, the first part of the crop was, I would say, five or six inches high. Then of course it varied on down according to when the crops were planted.

Q. Did you have occasion to go over the ranch during the summertime, Mrs. Stevenson?

A. Yes.

Q. Did you observe any change in the condition of these crops during the summer?

A. Yes, I did. [81]

Q. What was that change?

A. Well, they got pretty dry.

Q. Could you recognize the ranch on that map, Exhibit 2, there, the area that represents the ranch?

A. Let's see. Let's get the house here first. If I could find the house, maybe I could get started on the rest of it.

Q. Do you know where the house is?

A. That is what I am trying to find.

Q. It is down on the south side there, the south end.

A. Down here? It has to be over in here some place.

Q. Can you describe in about what area of the ranch, as you remember it, it was dry?

A. Well, let's see. It was dry out here—it would be north and east, it was all fairly dry, north and east, and then north and west.

(Testimony of Margaret E. Stevenson.)

Q. Could you describe the soil, the condition of the soil, about harvest time?

A. About harvest time? Well, it wasn't very smooth.

Q. Was it cracked? A. Yes.

Q. Can you describe those cracks, over what area they extended and the size of them?

A. I would be afraid to say.

Q. I see. About how high was the crop? How large had it grown about harvest time? [82]

A. Not very high. I would be afraid to put it into inches, but it seemed awful short.

Q. What was the average growth of the crop? How high would it get there under ordinary conditions?

A. Well, I have had it up to my waist that I know of; maybe a little higher.

Q. On how many occasions did you see Mr. Barr on the ranch there in 1953?

A. Well, let's see now. During the first part when he came, which would be in May, and during the time he planted, which I imagine was around two weeks, I am not just sure, and possibly two or three times after that.

Q. How long would he stay on the ranch?

A. Not very long at a time. We never saw him very much.

Q. In days?

A. I would be afraid to say.

Mr. Tonkoff: That is all.

(Testimony of Margaret E. Stevenson.)

Cross Examination

By Mr. Kester:

Q. Mrs. Stevenson, did you live on the Meiss Ranch yourself all the time from 1945 to '53?

A. Well, we were associated with the ranch, but we were in Macdoel part of that time.

Q. You lived in town yourself up until '52, didn't you? [83]

A. Just a minute. I was on the ranch until '47, maybe '48. I am not just sure, but right in there. And then we lived in Macdoel and we were associated with the ranch, and I helped my father-in-law with the scales there as weighmaster. So I was definitely connected with the ranch and I knew all the comings and goings.

Q. My question was merely where you were living. You were living in town? A. Yes.

Q. You had known Mr. Welch for a long time prior to that, had you not? A. Yes.

Q. He was quite a close friend of your family?

A. Well, he was a friend, I would say.

Q. When he called on June 10th and talked to you, did he tell you that he was getting an interest in the crop?

A. He didn't tell me anything. He asked me how the crops were, and I was so pleased because they were coming. And I said, "They are just fine, just coming along."

Q. Did he tell you anything then about his acquiring an interest in the crop?

(Testimony of Margaret E. Stevenson.)

A. He didn't say anything to me, not like that. He asked how the family was and hung up.

Q. Later on Mr. Welch came down and spent a good bit of the summer with you folks, did he not?

A. Yes, he did.

Q. He lived with your family at that time?

A. He was in the same household, yes.

Q. You folks were using one or some of the ranch buildings yourselves after Clay Barr came into the thing? A. Yes, we were.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.)

(Thereupon a recess was taken until 1:30 p.m. of the same day, at which time Court reconvened and proceedings herein were resumed as follows:)

Mr. Tonkoff: If the Court please, may I have Mr. Stevenson look at the pictures? Would you object to having Mr. Welch, who was with him when I took the pictures, testify?

The Court: You have no objection, have you?

Mr. Kester: I haven't seen the pictures.

The Court: As far as you know, you have no objection, have you?

Mr. Kester: As far as I know, no.

The Court: That is all I want to know.

Mr. Holst: Your Honor, I might explain to the Court that this is a 16-millimeter film— [85]

The Court: Don't explain anything. Get it over with as soon as you can.

(Whereupon the room was darkened and the moving picture films referred to were exhibited to the Court, during the showing of which Mr. James C. Stevenson, Jr., was examined and testified as follows:)

Mr. Tonkoff: Q. Mr. Stevenson, will you just state what these pictures represent as they are shown.

A. This is the southwest corner of the ranch there. This is up along the west side. That is the ditch there.

Q. Is that an irrigation ditch?

A. Yes.

Q. At what time were these pictures taken?

A. They were taken about the 10th of September, about the time they were starting to harvest.

Q. What is that?

A. That is up on the west side. That is barley there. This is up in the dobe wheat field we talked about. This is down in the heavier part of the ground. That was fairly close to the heavier portion. There is a ditch that runs to the lake. This is down in the weed patch we referred to.

Q. How much of that area was harvested?

A. Oh, just a small percentage of it.

Q. Is that green part all weeds or grain? [86]

A. The green stuff is weeds and the yellow is grain.

Q. What about that?

A. That is a field of oats there.

Q. Did that have irrigation, that last scene on the film?

(Testimony of James C. Stevenson, Jr.)

A. Well, it was in the lower part of the land, where it was subbed up better, yes.

(Thereupon, during the changing of film in the projector, the following occurred.)

The Court: Mr. Kester, you can either cross-examine after this, or you can have these run again later in the trial, whatever you consider to be fair from your point of view.

(Thereupon the showing of moving pictures was continued and the following occurred.)

The Witness: I believe that is up in the dobe land. That is a field of oats. That is pretty well along on the southwest side.

That shows the wheat in the field on the dobe land. That is a piece that he plowed up.

There is a potato field right across from the wheat. That is wheat, all right, there.

Mr. Tonkoff: Q. How many acres of grain was there?

A. There is the headgate and the ditch running across the field. There is a wheat field again, probably a couple of [87] hundred acres in the **wheat** field.

Q. Is that green area all weeds?

A. The green area is weeds. This is up in the north central part of the grain field. That is towards the north. There is a potato field. That is up toward the ranch house.

Q. Was Mr. Barr on the ranch at this time?

A. Not until later in the summertime. He left a man up there doing a little work, the tractor

(Testimony of James C. Stevenson, Jr.)

driver did a little work, and his nephew came down in the summertime later, the latter part of July.

Q. Mr. Stevenson, if that property had been farmed in a good and farmerlike manner, would it have produced any rye, wheat and oats?

A. Your rye should make you between twelve and fifteen hundred pounds to the acre. Your oats and barley should make you around 2500 to 3000 pounds per acre, and your wheat the same, in normally good years.

Q. Was this a normal year?

A. That is what I would say, it was a normal year; a very good year.

Q. That is 1953 you are talking about?

A. Yes.

(Thereupon the showing of moving pictures was concluded.)

Mr. Tonkoff: That is all. [88]

Cross Examination

By Mr. Kester:

Q. Did you ever know a year where you got 3000 pounds of wheat per acre?

A. I think pretty nearly any year that we had wheat on there we did.

Q. What year in particular?

A. Well, we raised a little wheat every year that we was there.

Q. And you think you got 3000 pounds per acre every year?

(Testimony of James C. Stevenson, Jr.)

A. Pretty consistently along like that, unless there was frost or something.

Q. Were you present all the time these movies were being taken? A. I was.

Q. How were they taken?

A. They was taken with a movie camera. We would go a little ways and stop and get out of the car and take some more, different shots.

Q. Who took the pictures?

A. Mr. Tonkoff.

Q. Do you know if those pictures have been edited at all before we saw them here?

A. No, I don't. I don't know whether anybody has seen them or not.

Q. You don't know whether all of the movies that were taken [89] have been shown to us?

A. We took two rolls of films that day, and I presume that that is about the two rolls of film there.

Q. Those cracks that you indicated, that was all up in the dobe ground?

A. That was on the west side, yes, and in the dobe.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.) [90]

ROLAND P. CHARPENTIER

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Where do you live?

A. Lewiston, Idaho.

Q. Are you one of the beneficiaries named in the agreement? A. I am.

Q. Did you have occasion to go over the Meiss Ranch in 1953? A. Yes, I did.

Q. What time of the year did you go down there? A. The first part of September.

Q. Were you present when these movies were taken? A. I was.

Q. Who was there besides yourself?

A. I and Mr. Welch and Mr. Stevenson and yourself.

Q. Can you recognize the Meiss Ranch from that map? A. No, I couldn't.

Q. What portions of the ranch did you cover? Did you cover the entire ranch?

A. Yes, we went over the entire part of the farm land and along the dikes.

Q. Did we take pictures of the good grain as well as the [91] weedy ground and where it was plowed? A. Yes, we did.

Q. Would you describe what you observed as to where the dry area was, whether there were cracks?

A. Yes, there was several cracks in the ground.

(Testimony of Roland P. Charpentier.)

Q. How were they for size? What size were they?

A. Oh, they ran from two inches to where I could put my foot in them.

Q. What way? Crossways?

A. Yes, crossways.

Q. Did you ask Mr. Horton Herman to resign as trustee? A. I did.

The Court: What has happened to Dougherty in this case?

Mr. Kester: I understood, your Honor, that in view of the manner in which the interpleader portion of the case was disposed of we regarded that his presence was no longer necessary. I understood he put in a consent to assert a claim to the \$15,000 fund on behalf of Mr. Kirschmer.

The Court: Is that in our file?

Mr. Kester: I understood it was supposed to be. I haven't looked at the file to see if it was.

The Court: Will you look at the file at the recess. Were you served with such a document?

Mr. Tonkoff: Your Honor, I think we were served with a pleading from your office, weren't we, Mr. Kester, in interpleader? [92]

Mr. Kester: Yes, we filed a claim by Mr. Barr to the \$15,000 on behalf of Mr. Kirschmer. I understood that Mr. Dougherty was filing separately a consent by Mr. Kirschmer to that claim. Whether that has been filed or not I don't know.

Mr. Tonkoff: I hadn't received any notice of that, your Honor.

(Testimony of Roland P. Charpentier.)

The Court: You better look at the file at recess.

Mr. Kester: Very well.

Mr. Tonkoff: Would you examine that telegram. I might say, Mr. Kester, that the original of that telegram is attached to the deposition of Mr. Herman.

Mr. Kester: What exhibit number was it?

Mr. Tonkoff: It is No. 6, according to the deposition number.

Q. Did you authorize Judge Cramer to send that telegram? A. I did.

Mr. Tonkoff: We offer it in evidence. It is a request for the resignation of the trustee, Horton Herman.

The Court: Admitted.

(Copy of telegram above referred to was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Tonkoff: Q. How long did you spend on the ranch there, [93] Mr. Charpentier?

A. Four days.

Mr. Tonkoff: That is all.

Cross Examination

By Mr. Kester:

Q. Are you a farmer yourself, Mr. Charpentier?

A. I am not.

Q. Your work has been what?

A. Club operator at present.

Q. A nightclub operator? A. Yes.

(Testimony of Roland P. Charpentier.)

Q. That has been your line of work quite steadily? A. Off and on, yes.

Q. At the time you came down to the ranch with Mr. Tonkoff and Mr. Welch in the first part of September, 1953, it was for the purpose of taking movies, was it? A. It was not.

Q. He had his movie equipment with him, did he?

A. No. I didn't come down to the ranch with Mr. Tonkoff and Mr. Welch.

Q. Oh, I am sorry. I must have misunderstood. You were with them there taking the movies?

A. I was there at the ranch when Mr. Tonkoff came.

Q. I see. When these movies were taken there was some [94] discussion, was there, about taking them for the purpose of evidence in the trial?

A. Yes, sir; there was.

Q. And at that time, then, there was a definite prospect that you and Mr. Tonkoff and the others were going to sue Mr. Barr; is that right?

A. Yes, sir.

Q. And the purpose of taking those movies was to get evidence for that case?

A. That is right.

Mr. Kester: That is all.

Mr. Tonkoff: That is all.

(Witness excused.) [95]

EDWARD J. WELCH

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Welch, you are one of the beneficiaries of this declaration of trust? A. Yes.

Q. Would you examine that instrument, which has been marked for identification as Plaintiff's Exhibit 7, and see if that is your signature and if the parties signed it in your presence in Spokane, Washington. A. It is.

Q. What date was that signed?

A. June 10th.

Q. And on June 10th prior to the time that this instrument was executed did you make any call?

A. Yes, I did.

Q. Where did you call?

A. I called Mr. Stevenson—I called for Mr. Bud Stevenson, Jr., at the Meiss Ranch at Macdoel, west of Macdoel, and I called from the Davenport Hotel in Spokane, Washington.

Q. What was the purpose of that call?

A. The purpose of calling was to find out the condition of the crops on the ranch at that time.

Q. Pursuant to the advice that you received on making that call, did you execute this agreement?

A. That is right.

Q. At that time did you talk to Mr. Barr at Spokane concerning the crops? A. No.

(Testimony of Edward J. Welch.)

Q. Did he make any statement to you at any time as to the value of the crops?

A. Well, the only statement he made was before our settlement, before I made the call, of the prospects of a good crop on the ranch.

Q. Did he tell you what the value of it was at that time?

A. Well, he said the value would run anywhere between a quarter of a million and three hundred thousand dollars. That would be the prospects of a decent crop off the ranch.

Q. Did you call Stevenson subsequent to that conversation with him or before? Did you call after he told you that? A. Yes, after.

Q. I see. Now, did you have occasion to go to Dorris or to Macdoel where the Meiss Ranch is prior to July?

A. I did, right around the 1st of July. I couldn't say the exact date, but it was right at the 1st of July I drove down.

Q. What observations did you make down there?

A. Well, the grain was burning up, and I immediately got [97] in the car and come back to Yakima and contacted you.

Q. What was done at that time?

A. At that time, why, we called Mr. Horton Herman at Spokane and asked him if he would come down to see first-hand the condition of the crops.

Q. Were arrangements made for Mr. Herman, yourself, myself and Mr. Barr to go down there?

(Testimony of Edward J. Welch.)

A. They were.

Q. Did Mr. Horton Herman go with you?

A. No.

Q. Who did go on that trip?

A. You and Mr. Barr and myself. We came up in your plane at Arlington and flew into the ranch—or to Klamath Falls.

Q. About what time of the month was that, if you recollect?

A. That would be in the early part of July, right after the first somewhere. I can't remember what date.

Q. And after we arrived at the ranch did we have a conversation and did you show Mr. Barr the condition of the crops?

A. We did. We went over the ranch with him and showed him, and you and I had an agreement with him that he would—the next few days he would be down with a crew of men and irrigate the ground.

Q. Did he state when he was going down and irrigate?

A. He said that the following Monday morning he would be there with a crew. [98]

Q. When were you with him down there, what date, do you remember?

A. It was Thursday or Friday, but I can't remember the exact date.

Q. When did you next go down to the ranch?

A. The next time I went to the ranch was right around the 1st of September. He had written us a

(Testimony of Edward J. Welch.)

notice, according to his agreement with us that he would notify us ten days before he started harvesting, so he sent us that notice and you informed me to go down and watch the operation.

Mr. Tonkoff: Your Honor, I move for the admission of Exhibit No. 7, which is admitted in the complaint or in the answer as the declaration of trust.

The Court: Admitted.

(The Declaration of Trust referred to was thereupon received in evidence as Plaintiff's Exhibit 7.)

Mr. Tonkoff: Q. Now, showing you Exhibit No. 8 for Identification, Mr. Welch, I will ask you if that is the correspondence which you received from Mr. Barr stating that he would start to harvest in the following ten days. A. That is it.

Q. What is the date of that?

A. The date of this is July 10th, 1953, and the starting date was September 1st, 1953. [99]

Mr. Tonkoff: I will offer that in evidence, your Honor.

Mr. Kester: May I see it, please?

Mr. Tonkoff: Q. Do you recognize Mr. Barr's signature? A. Yes, sir.

Q. Is that his signature on that paper?

A. Yes.

Q. You have had dealings with him in the past, have you? A. That is right; I have.

Q. Now, pursuant to the receipt of this Exhibit

(Testimony of Edward J. Welch.)

8 for Identification did you proceed to go out to the ranch? A. I did.

Q. Had you been down there previously after July 2nd, previous to the time you received this and after July 2nd?

A. You mean in between them two times?

Q. Yes. A. No.

Mr. Tonkoff: Do you have any objection to that, Mr. Kester?

Mr. Kester: No, it is all right.

Mr. Tonkoff: We offer that in evidence.

The Court: Admitted.

(The letter referred to, dated July 10, 1953, was thereupon received in evidence as Plaintiff's Exhibit 8.)

Mr. Tonkoff: Q. When you went down there to the ranch [100] when did you go down?

A. The last time I went—let's get this straight—it was September 1st.

Q. At that time was Mr. Barr harvesting?

A. No, sir; they hadn't started yet.

Q. Was he down there? A. No.

Q. When did he arrive?

A. Now, I can't tell you exactly, but I think they started harvesting sometime probably the 15th or 16th of September, or something along there, along about that time. A little after they had started harvesting was the first time I seen him there.

Q. After you got there what did you do?

A. After I got there——

Q. Did you examine the land and the crops?

(Testimony of Edward J. Welch.)

A. I just examined the crops and helped shoo the ducks off, and I just waited until they was getting ready to harvest.

Q. Under what circumstances did I happen to come down and take these pictures?

A. What?

Q. Under what circumstances was it that you asked me to go down there?

A. I called you at Yakima and told you that I thought it would be a good thing for us to come down and get some pictures [101] of the ranch and the crops, and one thing and another, because we would probably have to use them later.

Q. Had you farmed in that area previously?

A. Yes. Not in the Macdoel Valley or Butte Valley, but over across the hill east a little, Tulelake and Klamath Falls Valley.

Q. How far is Tulelake?

A. Oh, straight air line across there would be about 12 miles, I would say.

Q. Is that area about the same climate and the same soil conditions?

A. About the same thing, yes.

Q. How long did you farm down there?

A. About 26 years.

Q. What did you grow?

A. Everything that they grow there: Barley, oats and wheat.

Q. You had some experience and knowledge of the manner of farming down there? A. Yes.

Q. When you first observed the crops after you

(Testimony of Edward J. Welch.)

got there in September, was it obvious to you that the crop was way under——

A. That is right. You could see plainly that he had about, I would say, a third of a crop. [102]

Q. Could you determine why it was so small?

A. Why, sure. He hadn't irrigated it; he hadn't sprayed the weeds on a lot of it. He let his drain ditches back up and sub out about two or three hundred acres of it.

Q. What about the weeds?

A. Well, he didn't spray them. His ditches was weedy, and consequently two or three hundred acres he couldn't cut.

Q. About how much was plowed up from what you observed?

A. I would say about 200 acres, as an estimate.

Q. Did he at any time notify you that he was doing to plow some of the grain up?

A. He did not.

Q. What portions of the ranch did we take pictures of, Mr. Welch?

A. Well, we took pictures of the general farm area, I would say probably 2500 acres.

Q. Where it was dry how high was the grain?

A. Oh, about six or eight inches; something like that.

Q. Was it as high as your knees? A. No.

Q. Where there was moisture, around the ditch banks, how high was the grain?

A. It would be probably waist-high, pretty near.

Q. Were you there during harvest time?

(Testimony of Edward J. Welch.)

A. Yes. [103]

Q. Who was operating the harvester?

A. I didn't pay too much attention to who was operating. He had two or three boys there.

Q. Can you tell me how they operated the machines?

A. Well, if they would have been operating for me, they wouldn't have been operating at all.

Q. Just tell us how they operated there.

A. Well, it looked to me like they didn't know very much about what they were doing. They were running the machines so fast they were kicking a lot over, the side rigs was kicking it over. And their header was knocking a lot of small stuff down so that it wouldn't cut it.

Q. Was any grain left on the property after they harvested?

A. Naturally there will be when you throw it over the back end.

Q. How much would you say was in the fields per acre?

A. Oh, I would say the way they were harvesting lost five or six hundred pounds to the acre, at least. That is a hard one to estimate.

Q. Did you notice how they were hauling the grain away? A. Yes.

Q. Would you describe that.

A. Well, I thought that was rather odd, that they wouldn't want to save their grain. They would take their trucks and tear off down the road, and a lot of it would blow off the [104] top and it would

(Testimony of Edward J. Welch.)

spill out of holes through the truck beds, and the roadway looked like somebody was trying to pave it with grain.

Q. For what distance could you see that grain on the road?

A. Oh, about five or six miles, all the way from the ranch to the highway.

Q. Now, you say you were there when the ducks and the geese came in? A. Yes.

Q. What did you do to drive them off?

A. Well, the same thing you usually do. You usually take a car and go down there with a shotgun and shoot around until late in the evening, when they go back to the water, and early in the morning you get up when they start in again. Sometimes at night, when it is a really moonlit night, they will come in in the middle of the night.

Q. Can you tell in acres about how much acreage was lost due to the ducks and geese?

A. I would say at least—an estimate would be 60 to 80 acres.

Q. How were the weeds when you saw them on July 1st in comparison to the pictures that we saw?

A. Well, in July they were just starting. Your grain when it is up—your weeds start along after your grain. Your grain will get ahead of your weeds, and then a little while [105] later the weeds come up and get ahead of the grain and force out the grain, and you have got a beautiful weed patch and that is all you have got.

(Testimony of Edward J. Welch.)

Q. In your experience was it customary to spray for the weeds?

A. They have always done it at Tulalake, and the whole area. The weeds has been a bad thing in this country for years.

Q. Did you have any idea what the crop would bring when you first went down and before it was harvested?

A. Yes. I estimated the probable value of it.

Q. Do you know what the production is in that area for wheat, rye, oats and barley?

A. Yes, I have a fair idea.

Q. Would you state what it is.

A. Well, I would say on barley you could get anywhere around 3000 pounds, the same way for oats, and wheat, oh, anywhere from 1800 to 2500.

Q. What about rye?

A. Rye I would say 1500 or 1600 pounds, good rye.

Q. Mr. Welch, did you at any time demand that Horton Herman resign? A. Yes.

Q. As trustee? A. Yes. [106]

Q. Showing you Exhibit 9 for identification, is that a photostatic copy of a telegram which you sent to Mr. Horton Herman? A. Yes.

Mr. Tonkoff: I might say, your Honor, that the original of this is attached to the Horton Herman deposition.

The Court: Admitted.

(Photostatic copy of the telegram referred to was received and marked Plaintiff's Exhibit 9.)

(Testimony of Edward J. Welch.)

Mr. Tonkoff: Q. Is that a photostatic copy of the telegram? A. It is.

Q. Did your wife also authorize you to request it? A. That is right; she did.

Q. Why was a demand made on Herman to resign?

A. As I understood it, the main demand for his resignation was the fact that he come down here when we had this case scheduled a year ago—he came down here and called it off, somehow.

Q. Incidentally, whom did he represent in the Spokane case which resulted in the settlement and this trust agreement document? A. Mr. Barr.

Q. In the Spokane case who made the offer of settlement?

A. Mr. Barr and Horton Herman.

Mr. Tonkoff: That is all.

Cross Examination

Mr. Kester: Q. Whom did Mr. Tonkoff represent? [107] A. Myself.

Q. In other words, two trustees were the adversary attorneys in that lawsuit up there?

A. That is right.

Q. Mr. Tonkoff had a personal interest also because of his attorney's fees, did he?

A. That would be his only reason, as far as I know.

Q. And Mr. Herman had a personal interest because of his attorney's fees?

A. That is right, I presume.

(Testimony of Edward J. Welch.)

Q. I understand you to say that Mr. Herman came down here and called off the former trial?

A. That was my understanding.

Q. You have no personal knowledge about that?

A. No, just through my attorney, Mr. Tonkoff.

Q. You made this demand on Mr. Herman to resign merely because Mr. Tonkoff told you to, didn't you?

A. Well, yes.

Q. How did you determine that there was five or six hundred pounds lost per acre in the harvesting?

A. That is just the best explanation I can give you of it. We usually plan about 130 pounds to the acre when you plant a crop of grain down here. And that, you know, is just dribbled along here and there. Okeh. If you take a wide strip behind the combine, say 36 inches—that would be your cylinder [108] width—and you found that grain on the ground quite a bit thicker, that would give you some estimate of about how much you were losing.

Q. Are you sure there was five or six hundred pounds per acre?

A. I would say that, yes.

Q. There were about 3300 acres altogether?

A. No, there wasn't that many.

Q. Taking out the potato ground, there was about 3300 acres of cultivated land there, wasn't there?

A. No, I can't answer that question. I don't know.

Q. You don't know. All right. Are you saying

(Testimony of Edward J. Welch.)

that on every acre of grain ground there was five or six hundred pounds of grain lying after the harvest?

A. Of the acres that they harvested, yes.

Q. Did you go over every acre yourself?

A. No.

Q. You didn't see every acre yourself?

A. Not every particular acre. You don't naturally do a thing like that.

Q. Then you can't say that there were five or six hundred pounds lying on every acre, can you?

A. I didn't say that. I said that is about what I estimate.

Q. You estimated it merely by a comparison with what it looks like after seeding? [109]

A. Yes, and by former experience in threshing grain.

Q. How long were you down there during the summer of 1953? Can you give us the times you were down there?

A. About 30 days, I think.

Q. Altogether? A. Yes.

Q. And on what different occasions, again, please? A. Well, all during harvesting.

Q. That was about how long?

A. About 30 days.

Q. About 30 days?

A. Something like that. It could have been a little less; could have been a little more. I don't know.

Q. So most of the time you were down there

(Testimony of Edward J. Welch.)

was during the harvest? A. That is right.

Q. You were only down there once or twice besides during harvest? A. Once I was.

Q. Once?

A. Maybe twice. Twice, I believe that is right. I went down and come back.

Q. What were those dates?

A. About the 1st of July I drove down. That was the first time after we took the assignment of the crop, and the next time I was down with Mr. Tonkoff. We flew down. [110]

Q. That was on what date?

A. Oh, that would have been a little later in July, the first of July somewhere.

Q. Around the first of July?

A. Around the first of July.

Q. So the only times you saw the ranch were the first few days of July and then the month during harvesting; is that right?

A. That is right.

Mr. Kester: I think that is all.

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Welch, who fixed the attorneys' fees in Spokane as to who was to receive the respective amounts between Mr. Herman and myself?

A. Well, I would say Mr. Barr and Mr. Herman, they set the fees.

Q. Were they the ones that arranged the amount of \$15,000 to be paid for these fees?

(Testimony of Edward J. Welch.)

A. That is right.

Q. You and I had no discussion concerning that? A. Not any.

Q. Can you state about how many acres were planted to grain down there, Mr. Welch? [111]

A. As nearly as I could figure it from the photostat of the Soil Conservation Map and the acreages in different places, there was somewhere between twenty-five and twenty-six hundred acres that was actually planted in grain.

Mr. Tonkoff: That is all.

Recross Examination

By Mr. Kester:

Q. Did I understand you to say that you had a conversation with Mr. Barr and Mr. Herman with respect to setting the attorneys' fees?

A. Why certainly. When we were in Spokane on that case they wanted to settle it. We had them in Spokane—or Mr. Barr we had on a case in Spokane for fraud, and he wanted to get out of it.

Mr. Kester: Just a minute. Incidentally, your Honor, I didn't object to all this when it came in, but obviously the circumstances surrounding the Spokane case are immaterial here. Everything is going in more or less without objection.

The Court: As background.

Mr. Kester: But your Honor will appreciate that I don't mean to waive my position by inquiring into something they have brought up.

Q. Did you have a direct conversation with Mr.

(Testimony of Edward J. Welch.)

Barr where the amount of attorneys' fees was discussed? [112]

A. Not as to the attorneys' fees, no.

Q. So that what you said earlier, if I understood you to that effect, was wrong; is that right?

A. No, it is not necessarily wrong. I was with the group, and we were all interested in this. We still are. We got \$72,500 tied up in this thing. Naturally, we wanted to know what was going on, and who was to get what slices of what.

Q. I am trying to find out what you personally know, and not what you picked up from conversations with other people. Now did you personally have a conversation with Mr. Barr about the amounts of these settlements? A. Yes.

Q. And did you personally discuss the amount of the attorneys' fees with Mr. Barr?

A. No, I didn't personally discuss them. They discussed them in my hearing.

Q. Who?

A. Mr. Barr, Mr. Tonkoff, Mr. Herman, Mr. Charpentier and Mr. Cramer, Judge Cramer.

Q. So it was not just set by Mr. Barr and Mr. Herman, then? All those other people participated?

A. No, they didn't participate. We were all there to agree on what we were going to do here. Those interested in different stages of it, certainly, they had their own conversations and their own deals. [113]

Mr. Kester: I think that is all.

(Testimony of Edward J. Welch.)

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Welch, did I make any statement whatsoever as to what my attorney's fee should be?

A. You didn't to me.

Q. In the presence of Mr. Herman?

A. I never heard you in the presence of anyone.

Q. Did Mr. Herman suggest what my attorney's fees should be? A. No.

Q. What was said about attorneys' fees in that settlement where Mr. Herman also got \$10,000?

A. What was said about it?

Q. Yes, what was said about attorneys' fees?

A. Well, all I was interested in the thing was when you cut the thing up you was supposed to get your fifteen and Herman was supposed to get his ten.

Q. What I mean is who brought the amount of attorneys' fees up, do you know?

A. Mr. Herman.

Q. Did I at any time make any suggestion concerning how much the attorneys' fees should be which were received by either Mr. Herman or myself? [114]

A. No.

Mr. Tonkoff: That is all.

Recross Examination

By Mr. Kester:

Q. It was Mr. Herman and not Mr. Barr?

A. Well, take it however you want to.

(Testimony of Edward J. Welch.)

Q. I am asking you what the fact is.

A. Well, to my knowledge it was Mr. Herman. He was his attorney.

Mr. Kester: All right. That is all.

Mr. Tonkoff: That is all.

(Witness excused.)

Mr. Tonkoff: Mr. Kester, Mr. DeFrancq brought in his computation of the proceeds from this crop. Can you agree that that may be introduced in evidence, the amount that the crop brought?

Mr. Kester: I have no reason to doubt that it is correct. Mr. Barr had nothing to do with that settlement for the crop. Your representatives handled that with the representatives of Mr. Hofues and Mr. Kirschmer. Whatever you sold the crop for you should know. Mr. Barr had nothing to do with that. If that is what you sold the crop for, we will admit it. [115]

Mr. Tonkoff: Of course, we had nothing to do with the sale of the crop. I make that statement now. Anyway, do you have any objection to that going in evidence?

Mr. Kester: I say, if you say that is what the crop sold for, I will take your word for it.

Mr. Tonkoff: I don't know any more about it than you do, because this was furnished by Mr. DeFrancq for Kerr-Gifford, and I accept it as being a true statement without any controversy over it. I will offer it in evidence, your Honor.

The Court: Admitted.

(The statement of Kerr-Gifford above referred to was received in evidence and marked Plaintiff's Exhibit 10.) [116]

JOHN W. CRAMER

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Cramer?

A. I was an attorney-at-law. I am now a judge.

Q. You are a judge now. Of what court are you a judge?

A. The Tenth District in Idaho.

Q. That is Lewiston?

A. That is right; Lewiston, Idaho.

Q. At the time that this controversy occurred—I will ask you this: When did you go on the bench, Judge Cramer? A. In January of 1953.

Q. Prior to that time you were a practicing attorney, were you? A. That is right.

Q. Did you represent Mr. Charpentier in some litigation? A. Yes, I did.

Q. And arising out of that litigation were you ever in Spokane when this declaration of trust was drawn and executed? A. I was.

Q. That is your signature, I believe?

A. Yes.

Q. You have examined that document? [117]

A. Yes.

(Testimony of John W. Cramer.)

Q. Judge Cramer, if you will refer to this telegram—I think it is No. 7 or 8—I will ask you if that is a photostatic copy of a telegram which you sent Mr. Herman demanding his resignation.

A. It is.

Q. Was it sent on behalf of Mr. Charpentier?

A. Both Mr. and Mrs. Charpentier.

Mr. Tonkoff: That is all.

Mr. Kester: No questions.

(Witness excused.)

Mr. Tonkoff: If the Court please, we have some depositions of witnesses who are not here. Could we read them?

The Court: I have read them.

Mr. Tonkoff: Oh, you have read the depositions. We offer the films in evidence, your Honor.

The Court: Admitted.

(The moving picture films heretofore exhibited to the Court were received in evidence and marked Plaintiff's Exhibit 11.)

Mr. Tonkoff: Have you read Horton Herman's deposition, your Honor? [118]

The Court: I will this evening. I think I have read it. Are these new depositions since the last hearing?

Mr. Tonkoff: Yes, your Honor. These were taken of witnesses in Klamath Falls. I think this was sent in here about three or four days ago.

The Court: You give the Crier here the depositions that have been taken since the last hearing. I have read everything up to the last hearing. You

give him what has been taken since the last hearing and I will read them this evening. You sort out the ones that were taken since the last hearing.

Mr. Tonkoff: This one deposition includes also the two Mr. Stevensons' testimony, and there are five other witnesses besides that which we offer.

The Court: I will take them all home tonight, Gentlemen, to make sure I have read them all.

Mr. Kester: Are you offering the exhibits that were taken in connection with the depositions, also?

Mr. Tonkoff: They are part of the depositions. Your Honor, in connection with the exhibits which are attached to Mr. Herman's deposition, I am offering those, too, and, in addition thereto, his resignation, the original of which I have here. That is Mr. Herman's resignation.

Mr. Kester: I have no objection except for the legal question that it is void. I have no objection to it going in evidence. [119]

(The resignation of Horton Herman above referred to was received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Tonkoff: Excuse me, Mr. Kester. I am also offering, your Honor, a demand and release which is signed by all of the beneficiaries—all of them, that is, except Harvey Barr, dated January 27th, in which Mr. Herman demanded of us a release of any claims of any kind whatsoever.

The Court: Make your statement, Mr. Kester.

Mr. Kester: In connection with the Herman deposition there was indentified at that time the

complaint in the Spokane lawsuit which was being settled, and at that time in connection with that offer I obtained a copy of the answer and put it in also. It is my position that the pleadings in that case are wholly irrelevant and immaterial. I just don't want the point to be waived by my failure to mention it here.

The Court: The depositions are admitted, together with all exhibits attached, subject to the objections as have been stated or may hereafter be stated prior to the final submission of the case.

(The demand and release above referred to, dated January 27, 1953, was received in evidence and marked Plaintiff's Exhibit 13.)

HARVEY BARR

was produced as a witness in behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Barr, are you the father of Clay Barr?

A. Yes, sir.

Q. Mr. Barr, on or about July 9th of 1954 did you purchase Mr. Horton Herman's interest?

A. I purchased it.

Q. What did you pay for that interest?

A. He sold me his \$10,000 interest for 75 cents on the dollar, or \$7,500, and I bought it at about that time.

Q. You are the beneficiary now under this, and

(Testimony of Harvey Barr.)

as a result of that purchase you stepped into Mr. Horton Herman's shoes and are expecting a division of these funds, are you not?

A. Well, I expect a division of this money that is in the hands of the grain company or the Court, or wherever it is at this time. I don't know.

Q. You expect to get the full amount of Mr. Herman's \$10,000 if the Court sees fit to award the beneficiaries a judgment?

Mr. Kester: I will object to that as purely a legal question.

The Court: He may answer.

A. I don't know whether I understand the question or not. [121]

Mr. Tonkoff: Q. Don't you expect to get the full \$10,000 in payment of your purchase if there are funds available to pay it?

A. It depends on where that fund comes from. I want my part of the barley. I am a farmer, and I want my part of what that crop is bringing.

Q. When you say it depends on where the funds come from, does it make any difference to you from where the funds might be derived to pay your full \$10,000? A. Yes, it does.

Q. What difference does it make to you, Mr. Barr?

A. Well, I don't want it to come through no suit or anything of the kind, or any part of it. I want it to come from the sale of the barley, just as the original contract stands.

(Testimony of Harvey Barr.)

Q. You mean you don't want your son to pay it?

A. I don't want anybody to pay it except the barley.

Q. You do make a claim to these funds that are now held by Kerr-Gifford? A. Yes.

Q. What sum do you think or do you claim, or make a claim on? There is over \$44,000 deposited. Do you make claim to the whole \$44,000?

A. I am making a claim on my proportion of it except the \$15,000 that is due Clay out of it.

Q. You mean you want your son to take that \$15,000 and divide the rest of the money? [122]

A. That is the way that the contract was written, I believe.

Q. So that your son won't be hurt financially in this transaction?

A. I ain't particularly interested in who is hurt. I just want it to come out the way it should come out.

Q. You say you are not particularly interested in who is hurt. Weren't you expecting to get a bargain when you bought that for \$7500?

The Court: Oh, that is enough.

Mr. Tonkoff: All right. That is all, your Honor.

Cross Examination

By Mr. Kester:

Q. Mr. Barr, did you authorize the bringing of this action?

A. I gave authorization of nothing. I will take

(Testimony of Harvey Barr.)

that back. I authorized the insurance on this grain.

Q. Did Mr. Tonkoff ask you about bringing this lawsuit?

A. He never asked me anything about bringing this lawsuit.

Q. Did you ever give any consent to the bringing of this lawsuit?

A. I never gave any consent to anybody for anything except to pay for fire insurance on the crop.

Mr. Kester: Thank you. [123]

Redirect Examination

By Mr. Tonkoff:

Q. Mr. Barr, where do you live?

A. I live in LaCrosse, Washington.

Q. What is that?

A. I live in LaCrosse, Washington.

Mr. Tonkoff: That is all, your Honor.

(Witness excused.)

Mr. Tonkoff: Under the circumstances, your Honor, assuming that the depositions or the testimony in the depositions is in evidence, we rest.

The Court: You better offer them. You better offer the depositions. You can do it at recess and put them in the record. Take your time at recess. Then you won't be in a hurry. State them to the Reporter at that time.

Mr. Tonkoff: All right, your Honor.

The Court: Otherwise you rest, do you?

Mr. Tonkoff: Yes.

The Court: Go ahead. [124]

Defendants' Evidence

LESTER LISTON

was produced as a witness in behalf of Defendants and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Where do you live, Mr. Liston?

A. Klamath Falls, Oregon.

Q. What is your work?

A. Aerial crop spraying.

Q. How long have you been in that business?

A. Pretty nearly three years. But I went in with my brother, who has been operating since 1947.

Q. Do you operate under a business name?

A. Farmers Air Service.

Q. Tell us briefly about how this aerial spraying works. How do you go about doing it?

A. Well, we solicit our jobs in order to have steady customers to work for. Then different types of weeds require different amounts of 2-4-D—speaking of weed control—they require different amounts of 2-4-D. And there is a certain stage of development in the grain that you can spray.

Q. Is 2-4-D the standard spray for weeds in that area? A. That is right.

Q. You say there is a certain stage when it can be done. What is that stage? What is the stage of the grain, roughly? [125]

(Testimony of Lester Liston.)

A. The plant should have at least three leaves on it. Preferably it should be from, oh, four to six inches high, and from that time until it reaches the boot stage where the head begins to develop in the plant. The height of it doesn't make any difference. It is just the development of the plant itself.

Q. What happens if you spray grain for weeds when it is not in the stage of development you have described? A. What happens to——

Q. To the grain?

A. To the grain plant? That will depend on how much 2-4-D you put on. A normal dosage, up to two or three pints per acre, has relatively little effect on it, although I would like to explain it could——

Q. If the plant is weak or sickly, what effect does 2-4-D have on the grain?

A. Enough 2-4-D leaves blank heads. There is no grain or mis-formed heads.

Q. Are you familiar with the type of weeds on the Meiss Ranch, particularly in the area west of the dike and in the southeast portion of the cultivated area? Are you familiar with that area?

A. Is that the one that they call the weedy area?

Q. Yes. [126]

A. I believe so.

Q. Do those weeds have a name?

A. We call them an alkali weed. They have a technical name, but I don't know that.

(Testimony of Lester Liston.)

Q. Are they pretty tough? What is the fact about that kind of weeds?

A. They are particularly obnoxious, yes. They are difficult to kill.

Q. Does it take quite a bit of 2-4-D to kill that kind of weeds? A. Yes.

Q. Were you on the Meiss Ranch in 1953?

A. Yes.

Q. How many times were you there?

A. Twice.

Q. When was the first time?

A. The middle of May, I would imagine, between the 15th and the 20th of May. That is a guess.

Q. What was the occasion of your being there?

A. I went to solicit work.

Q. Whom did you talk to?

A. I talked to Mr. Stevenson, Jr., and Mr. Barr.

Q. What was the gist of that conversation?

A. Well, at that stage of the grain there wasn't any of it ready to spray as yet. Mr. Barr said that if he needed any spraying done he would get in touch with me, so I didn't go back there again until he called me.

Q. Were they still planting at that time?

A. I believe so, although I didn't get over much of the ranch. It just happened this part of it had been seeded early, was the only part I got over at that time.

(Testimony of Lester Liston.)

Q. Which portion are you referring to as being seeded early?

A. This piece east of the dike and next to the lake there, I suppose. It is stuff that was up. The grain was up more in this spot down in here.

Q. I think you said east of the dike. You mean west of the dike? East of the dike is all lake.

A. Oh, west of the dike, yes. Excuse me.

Q. That was coming up at that time, was it?

A. Yes.

Q. Were there weeds visible at that time?

A. Yes.

Q. What was the stage of development of the grain at that time in that area?

A. Well, it had just begun to come up. It was coming up, most of it—the plants had broken ground, and some of them were up perhaps two inches, if I remember correctly.

Q. Could you tell at that time whether the grain in that area was going to be healthy or not?

A. Well, no, I don't say that I could. [128]

Q. Did you come back later on? A. Yes.

Q. When was that?

A. It was about the 1st of July. Mr. Barr called my home and said he wanted some spraying done, so I went down, I believe, the following day, which would have been probably the 2nd or 3rd of July.

Q. Did you talk to him there? A. Yes.

Q. What was that conversation?

Mr. Tonkoff: That is objected to as hearsay, your Honor.

(Testimony of Lester Liston.)

The Court: Overruled.

Mr. Kester: Q. What was the conversation?

A. He said he had some weeds he wanted sprayed, and I looked at them. The weeds were—this particular type of weed was too big to spray, and the grain was in the boot stage, so you couldn't spray it without damaging the grain.

Q. What area were you referring to?

A. Well, this stuff here west of the dike, and then we looked at some grain up in this area, I believe it was. I am not familiar with the map.

Q. The last time you were pointing to an area north or across the ditch that goes across the middle of the old bottom there.

A. That is right. I believe that is the area that we were in. We did do some spraying in there.

Q. This area in the southeast part of the cultivated ground west of the dike, what was the condition of the grain then as far as being healthy or not?

A. Well, I would say it wasn't too healthy.

Q. What was the condition of the soil, then, as you looked at it? Could you tell?

A. Well, I didn't examine it a great deal. After we saw the condition of the plants and the condition of the weeds there wasn't anything that we could do about it. This particular weed, after it gets up six or eight inches, possibly, at the extreme in height it takes so much 2-4-D to kill it that it wouldn't be practical. You would kill the grain or damage it severely.

(Testimony of Lester Liston.)

Q. Is that what you advised Mr. Barr?

A. That is right.

Q. With respect to the other area north of the cross ditch, what was the condition up there?

A. We found one area just off the cross ditch in this general locale that the grain was not in the boot stage, and there were some weeds in it and we did spray a little portion of that.

Q. When did you do that spraying?

A. That was within the next two or three days, I believe.

Q. Did you do any other spraying around there?

A. We sprayed some of the ditches down in this area.

Q. Now, did you look over the entire cultivated area there with respect to the weed condition?

A. Not all of it, no.

Q. Did you look around other places besides the two that you have already mentioned?

A. We did drive around over quite a lot of the area, but in respect to the map I couldn't tell you where it is at this time.

Q. Aside from the two areas that you have mentioned, did you see any other places that needed spraying?

A. I don't recall that I did. It has been quite a while ago.

Q. Did you notice the potato patch in there?

A. Yes.

(Testimony of Lester Liston.)

Q. What would be the effect if you got any of that spray on growing potatoes?

A. Well, you just can't do it.

Q. Would it kill the potatoes?

A. That is right.

Q. For that reason do you have to stay some distance away from a field of potatoes in your spraying?

A. Yes. It would depend upon the prevailing winds, how close you can get. If the wind is blowing away from the potatoes, you can spray quite close. If it is blowing towards them, why, you can't spray close at all—a quarter of a mile or perhaps more. [131]

Q. Can you spray when it is wet and rainy?

A. Not to much advantage. If it is raining much, you can't.

Q. Do you recall what the weather was like in the spring of 1953 during May and June?

A. Well, we didn't work in that area at all that year. Our work was confined to the Klamath Basin, and I don't recall too much about it.

Q. What is the usual time for spraying in that area? When does it usually get in the condition where you can spray?

A. Well, that depends on an early or late season. The earliest we ever get started down there is, oh, possibly the first week in June, and usually it is around the 10th of June, and will run up until the latter part of July.

Q. Most of the spraying is done during July?

(Testimony of Lester Liston.)

A. Most of it from the middle of June until the middle of July.

Mr. Kester: I think that is all.

Cross Examination

By Mr. Tonkoff:

Q. Mr. Liston, how long have you lived in that community?

A. In Klamath Falls three years.

Q. How long? A. Three years. [132]

Q. I thought you said you were in business there from 1947?

A. My brother. I went with my brother, who had been operating out of there since that time. He was the first weed-sprayer in that area, aerial sprayer.

Q. It is customary to spray crops when the weeds are coming up, is it not?

A. Well, the smaller you can get the weeds the better it is for the grain if it is big enough.

Q. When you talked to Mr. Barr in May, that was when he was planting, was it not?

A. I understand that that is right.

Q. And then you never saw him again until July 2nd, is that right?

A. That is approximately right.

Q. These weeds must be sprayed when they are just right; otherwise, it doesn't do any good, as you say; is that right? A. That is about right.

Q. The weeds that you looked over there were too big to spray, weren't they?

A. That is right.

(Testimony of Lester Liston.)

Q. They should have been sprayed before that, shouldn't they?

A. Well, that I don't know. I wasn't in there from the middle of June until the 1st of July, and I don't know whether there was a stage in there getting the grain conditions right [133] and the weed conditions right—whether you could spray or not. I wouldn't be able to say at all.

Q. Well, if the weeds were too big, they were smaller sometime prior to that time, and they could have been sprayed at a time when they would have been killed and the grain saved; isn't that right?

A. I can't hear you.

Q. I say, there was a period sometime before July 2nd when those weeds could have been sprayed and killed and it would have given the grain opportunity to grow; isn't that right?

A. I wouldn't be able to say that. There may have been a period in there that you could have enacted some control. That particular weed is very difficult to kill. As I say, you have to get it when it is quite small and when the grain is started enough to stand a pretty heavy dosage, in order to get a kill.

Q. You are not in a position to tell us whether or not there was a time there when that was ideal to spray, then, are you?

A. Not having been there—there was a period of about six weeks I wasn't on the place at all. I wouldn't say, no.

Q. The weeds were about a half a mile away

(Testimony of Lester Liston.)

from where that potato patch was, weren't they?

A. Well, as I recall, I would say about a quarter of a mile.

Q. Haven't you in your business sprayed one kind of a crop next to another one where it was growing, and where one crop would be injured by the spray and the other one would be benefited?

A. I have sprayed quite close when the wind is right. I can't spray too close——

Q. You get with in 30 or 40 feet of them, don't you, of one crop and the other?

A. Not than close to potatoes.

Q. Certainly you could have sprayed some of that wheat, or that wheat could have been sprayed?

A. As far as the proximity to the potatoes, that could have been sprayed, probably.

Q. The only reason you didn't spray it was because he never asked you to come out and spray prior to July 2nd; is that right, Mr. Liston?

A. Well, that is the only reason we didn't.

Q. There is a need to spray down there——

A. I would like to correct that. I wouldn't say it is the only reason we didn't. We will spray any time that we feel we can do our customers some good.

Q. Anyway, it was too late for you to do Mr. Barr's grain crop any good, by July 2nd; isn't that right?

A. That is right, except for the portion that we did spray.

(Testimony of Lester Liston.)

Q. There weren't any weeds visible there when you first went out there May 15th, were there?

A. Yes, sir; there were quite a number.

Q. You say there were quite a bunch of weeds?

A. Yes, there was.

Q. They should have been sprayed long before July 2nd, shouldn't they?

A. Well, if they were to be sprayed at all they should have, yes.

Mr. Tonkoff: That is all. Thank you.

Redirect Examination

By Mr. Kester:

Q. How big were the weeds in the middle of May when you saw them, do you recall?

A. Oh, I would say probably an inch to an inch and a half. That is a guess.

Q. And how tall was the grain at that time?

A. Oh, probably just a little bit taller. Some of it was just breaking ground, and some of it was taller—was out of the ground probably two or three inches.

Q. If you spray while the grain is still less than, say, three or four inches high, what will that do to the grain?

A. It will come out, usually, with no heads, no kernels in the heads.

Q. In other words, it will damage the grain if you spray it too early? [136]

A. If you put on enough, it would actually kill the plant itself.

(Testimony of Lester Liston.)

Q. But if you wait too late, then the weeds are too big to kill; is that right?

A. Well, at the time I was down there in July it was certainly too late.

Q. In other words, there is a period of time there that requires the exercise of some pretty close judgment as to the relative strength of the grain and the weeds; is that right?

A. That is right. If your grain gets what we call the jump on the weeds and gets ahead of the weeds, why, you have a pretty good condition. If the weeds get ahead of the grain when they are still quite small, then that is a difficult condition, particularly with that type of weed.

Q. Then there isn't much you can do about it; is that right?

A. Well, it is a poor condition.

Mr. Kester: That is all.

Recross Examination

By Mr. Tonkoff:

Q. Mr. Liston, you said you observed some of the grain was not too healthy. Was that on account of lack of spray or lack of water?

A. Well, I don't think I quite exactly said that. I said it didn't appear to me to be too healthy, but that is not my business particularly, and the reason I didn't go into it was because it was none of my business.

Q. Didn't you observe the ground where it was, whether it was moist or not?

(Testimony of Lester Liston.)

A. Well, I didn't dig into it, as I remember. The surface of the ground would usually appear to be dry unless you dig into it, dig down. If the ground is wet, then you will strike moisture within an inch or so of the surface.

Q. In your opinion, it was one way or the other, either a lack of water or too many weeds?

A. Then you also have several other factors that enter into it. But what it was I don't know. There was frost that year, there is an alkali condition in that ground, and there is several factors. I wouldn't attempt to say what it was.

Q. Is that the first time you had ever been on that ranch? A. That is right.

Q. You say you noticed alkali out there?

A. Alkali soil.

Q. But you didn't notice dryness of the crops?

A. Well, as I say, I don't remember whether—it wasn't wet, as I recall, but I didn't dig into the soil. I just noticed the state of the grain and the state of the weeds. When we saw the grain, it was at the stage where we couldn't possibly have sprayed it without damage. Then I didn't look into it any further. [138]

Mr. Tonkoff: Thank you. That is all.

Mr. Kester: Thank you.

(Witness excused.) [139]

CLAY BARR

one of the Defendants herein, was produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. You are Clay Barr, who is a defendant in this case? A. Yes.

Q. Where are you living right now, Mr. Barr?

A. Living in Portland.

Q. Where has your home been, generally speaking?

A. Until quite recently I have been on a ranch in Eastern Oregon, a wheat ranch in Eastern Oregon.

Q. Where was that?

A. The post-office address was Mikkalo.

Q. How long were you on that place?

A. Three years.

Q. What has been your experience generally in farming?

A. Oh, I was born and raised on a farm and did just about everything there was to do around one.

Q. Have you been farming most of your life?

A. All my life.

Q. What different types of farms have you lived and worked on?

A. Oh, stock and grain and a little irrigation.

Q. In what different parts of the country have you done [140] farm work?

(Testimony of Clay Barr.)

A. I was raised in the southern end of Whitman County in the State of Washington as a kid, and was in that territory until about '49. Since then I have had experience on land in Montana, Oregon, as well as this place in California.

Q. How did you first become acquainted with the Meiss Ranch?

A. The first time I became acquainted with it a real estate man took me down there to see the property along in 1948. He was trying to sell it.

Q. What was the next time after that that you were on it?

A. I was on the place in 1951.

Q. How long were you there that time?

A. We was just in there for an observation of the place through one day each time.

Q. When was the next time you were down there?

A. The next time I was on the place was when I was negotiating for a lease on the place in May of 1953.

Q. How did you happen to be negotiating for a lease at that time?

A. Mr. Hofues and Mr. Kirschmer contacted me to take it over.

Q. Did they express to you any reason for wanting you to take it over?

Mr. Tonkoff: That is immaterial. That is objected to, your Honor. [141]

The Court: He may answer.

(Testimony of Clay Barr.)

A. For the present dissatisfaction in which it was being operated.

Q. Who was operating it then?

A. It was my understanding that Mr. James Stevenson, Jr., was managing the place for the owners.

Mr. Tonkoff: His understanding is objected to, your Honor.

The Court: Overruled.

Mr. Kester: Q. After they asked you to take it over what did you do?

A. In a few days—I don't know just how many from the time that they approached me—I went down to the place, down to Klamath Falls and on down to the place, for an inspection of it.

Q. About what date would that be?

A. I went down about the 5th of May, on the 5th of May.

Q. Who was with you at that time?

A. My father and Perry Morter.

Q. What did you do? Did you go out on the place?

A. Yes. We set up a tentative agreement in Klamath Falls of the working conditions which I would work under, and then went out to the place.

Q. Did you all go out to look at it then?

A. Yes. Well, I say all of us. Mr. Hofues didn't go out. [142] Mr. Kirschmer and the boys that was with me.

Q. When you examined the ranch at that time,

(Testimony of Clay Barr.)

would you tell us the conditions that you found there.

A. Oh, in the fields on the southeast portion, the grain, approximately 650 or 700 acres in that field was all seeded.

Q. Pardon me. Would you point to the areas there as you describe them.

A. Well, yes. This is the county road here, going out into the field right here. And this entire section right in here, which runs just something under 700 acres, was all in grain.

Q. Is that the area that has been referred to here as the weedy patch? A. Yes.

Q. That had already been seeded when you first saw it?

A. Yes, that had already been seeded.

Q. What was the condition of the soil there at that time? A. Very wet.

Q. Was there water standing on it?

A. At the time we first went down there and looked at it that day there was not actually water standing on the ground, no.

Q. Now what other areas did you examine and what condition did you find?

A. We examined the entire ranch; that is, the grain part of [143] the ranch. As you go on to the west side over there, there was an area seeded along this edge, from this center canal along this edge down here, that had already been seeded.

Q. What was that seeded to?

A. Barley. And they were working in this field,

(Testimony of Clay Barr.)

as referred to as the dobe ground, this approximately 400-acre field up here, at the time with their equipment.

Q. Who was working up there?

A. The men that Mr. Stevenson had working for him.

Q. Were they planting up there?

A. They was seeding. I think there was one rig harrowing, another one seeding, and one disking.

Q. What was the condition of other areas?

A. In this area right here there was a little patch on the high ground across the ditch——

Q. That is in the southwest corner?

A. In the southwest corner—that was also seeded. I don't know the exact acres in that piece there, but I call it someplace between 40 and 50 acres.

Q. What was that seeded to? A. Wheat.

Q. What else had been done?

A. That was all the ground that was seeded at that time. When I was there they were working this potato land. The people that had it leased was leveling it so that they could irrigate for seeding.

Q. What was the condition of the area north of the cross-ditch?

A. You are speaking of the cross-ditch running east and west here?

Q. Yes.

A. An area on the east side of it here had been fall-plowed, approximately six or seven hundred acres in there, and it was just too wet to do any-

(Testimony of Clay Barr.)

thing at all with at that time. Between that and the dobe ground in here they had seeded a bunch of oats in there late, and then they had never ripened, and they rented it out for sheep pasture. It was uncut.

Q. You are referring to the prior year?

A. Yes, that was the prior year. That was the condition of the ground there. The crop had growed up, but the sheep had just tromped it down.

Q. It was very heavy stubble, I suppose?

A. Extreme heavy stubble. It had growed big.

Q. What was the condition of the ditches at that time?

A. In what we refer to as the weed patch out here there was a drainage ditch, a cross-drain ditch, comes through the middle of it both ways, parallel clear across the field. That was just literally full of weeds out there. There was weeds on the other ditch, and that slid and caved into the ditch in numerous places. [145]

Q. Up on the dobe ground what was being done there as to how the seeding was being done? What preparation, and so on, was made up there for the seeding?

A. Well, I would say they practically wasn't making any preparations from a farmer's standpoint. They was pulling a light disk over that ground, seeding it and harrowing it, was all that was being done. (Short recess.)

Mr. Tonkoff: We offer the deposition of A. G. Kirschmer, taken by the defendants at Amarillo, Texas, on the 5th day of January, 1955; the deposi-

(Testimony of Clay Barr.)

tion of Horton Herman, together with the exhibits attached thereto, taken on the 30th day of September, 1955, at Spokane, Washington; and the depositions of Clarence F. Enloe, Mary E. Noakes, James H. Noakes and J. R. Ratliff, taken on the 7th day of October, 1955, at Klamath Falls in our case in chief.

The Court: Admitted.

(The depositions above referred to, together with the exhibits attached thereto, having been heretofore filed in the above cause, were received in evidence.)

Mr. Kester: Q. At the time you observed the seeding operations on the 7th of May what was the condition of the seeding? [146]

A. That they had been doing?

Q. That they had been doing, yes.

A. On the dobe ground where they was actually putting it in they wasn't making any seed bed. They was cultivating the ground so little that the last year's stubble was still standing straight up on it, and the seed was—a lot of it was lying on top of the ground.

Q. Were they doing anything about that?

A. That is where they was harrowing over after the drill and trying to cover it up.

Q. They were running a harrow after the seeding?
A. Yes.

Q. Is that a normal seeding process?

A. Most generally if they had press drills there you would do any work ahead of the press drills.

(Testimony of Clay Barr.)

Q. How much of that dobe ground was seeded before you got there?

A. Before we went down to take over?

Q. Yes.

A. At the time we went down, actually went down and took over the operation, they was still seeding up here, and they had it all seeded except a chunk up here in the extreme west side of 60 or 70 acres, or such a matter.

Q. About how many acres up in that dobe ground did they seed?

A. They seeded it all. [147]

Q. About how much did that amount to?

A. Oh, they are claiming 400 acres in there, and approximately 60 or 70 acres there was never seeded.

Q. When you were down there first on the 7th of May what was the condition of the lake and water in the lake?

A. At the time we went in to make our inspection of the place it was a windy day. We was there two days. One of them was a windy day, and I hiked up and down along the dike there, and the wind was blowing the waves clear over the top of the dike.

Q. Was the lake level clear up to the top of the dike?

A. In places it was, and the waves was going clear over.

Q. Now up to that time, by the 7th of May, how much ground had already been seeded?

(Testimony of Clay Barr.)

A. I would estimate maybe 1200 acres.

Q. Where did those 1200 acres lie? Can you show us?

A. They seeded this chunk in here I referred to as just under 700 acres. That was the weed patch, that entire area. And they seeded all of this 400 acres except what was summer-fallowed. They seeded a strip down along the west edge of the field that the potatoes was in, and they seeded this chunk of wheat.

Q. The wheat in the southwest corner?

A. The southwest corner.

Q. That comes to around 1200 acres? [148]

A. I just roughed it off there in my mind, about 1200 acres.

Q. You spoke about the ditches being clogged with mud and weeds, and so on. How can that be corrected or when can it be corrected?

A. Well, your correct time was there—any ditches the cleaning, regardless of what is in it, has to be done in the fall of the year when it is so you can get out there with a dragline and scoop them out before the rains set in.

Q. A dragline is heavy equipment that would take dry ground to operate on?

A. Yes. It would mire down in the spring of the year, during the wet season.

Q. At that first visit there did you have any discussion with Mr. Kirschmer about the relationship that he had with Bud Stevenson?

A. Yes. We arrived at a plan for the lease, a

(Testimony of Clay Barr.)

percentage basis, and he was to pay all the bills that would derive from it. And then he brought up the question there that Bud Stevenson was managing the place——

Mr. Tonkoff: I object, your Honor, to any conversation with Mr. Kirschmer concerning Mr. Stevenson not in his presence.

The Court: Overruled.

A. And I asked for him to remove Mr. Stevenson from the [149] place. He informed me that he had a written agreement with Mr. Stevenson in which he couldn't remove him from the place, and I would have to get along with him.

Mr. Kester: Q. Did he tell you what that agreement was?

A. He told me approximately that he was getting \$500 a month and expenses and a percentage, I think was the way he put it.

Q. Now, was there any agreement between you and Kirschmer about the relationship between you and Bud Stevenson after you came in? That is, what were you supposed to do so far as Stevenson was concerned?

A. He informed me there at the same time of the different agreements and leases on the place; that Noakes had part of it and Mr. Stevenson, Sr., had part of it for pasture; there was potato leases out, and there was Bud Stevenson's agreement, and I had to get along subject to all of their leases.

Q. Was any arrangement made for paying Bud Stevenson?

(Testimony of Clay Barr.)

A. Yes. We discussed the wages that he was to get, and there was quite a conversation about it, and we arrived at a compromise agreement that I was to pay Bud his \$500 a month and he would take care of the percentage end.

Q. Kirschmer would take care of the percentage end?

A. Yes, Mr. Kirschmer would take care of whatever percentage basis—

Q. Did you, in fact, pay Bud Stevenson's \$500 a month to him? [150]

A. Yes, I did.

Q. Did you have any understanding with Kirschmer about what work Bud Stevenson would do after you were there?

A. He was supposed to work with us, get along, and we tried—I put in then for him, when he was going to be there, to look after the water and the ditches, was all I asked for him to do.

Q. Did you discuss all that with Bud Stevenson?

A. No, I discussed that with Mr. Kirschmer.

Q. After that did you have a discussion with Bud Stevenson about what he was to do, and so on?

A. From time to time I had a few conversations with him, trying to get him to go out and clean out some weeds out of the ditches and a few things for drainage.

Q. What was the situation as between you and Bud Stevenson with respect to who was boss? Who was in charge there?

(Testimony of Clay Barr.)

Mr. Tonkoff: I don't think that is material, your Honor. The contract speaks for itself.

The Court: Overruled.

A. He was actually over me because he says his contract was written ahead of mine. I was last because I come in last.

Q. Is that the way it worked out?

A. That is the way it worked out, yes.

Q. What about Bud Stevenson's living arrangements there?

A. I put in to get living quarters there, but it didn't [151] work out that way. I was unable to do it.

Q. Did Bud Stevenson stay on in the ranch house?

A. Yes, he stayed on. I put in for him to get an apartment in town and travel back and forth so I could move in there, but it didn't work out that way.

Q. Was there more than one ranch house for a family to live there on the place?

A. Yes, there was two ranch houses on the place.

Q. Who lived in those?

A. There was Bud Stevenson and his family lived in one, and there was a cook on the place lived in the other one.

Q. Where did you live when you came in?

A. I lived in the bunk house with the men.

Q. Were you able to bring your family down at all? A. No, I couldn't.

(Testimony of Clay Barr.)

Q. Was there any place for your family to live in?

A. No. All we had was the bunk house where all of us stayed together.

Q. Where did your family stay, then, during that summer?

A. They stayed on the ranch up at Mikkalo.

Q. Up here in Oregon?

A. Yes, Northern Oregon.

Q. As a result of that initial conference did you enter into a lease with Hofues and Kirschmer?

A. Yes. [152]

Q. I will ask you to look at this document and tell us if that is the original signed copy of the lease.

A. Yes, that is the original lease.

Mr. Kester: I offer it in evidence.

Mr. Tonkoff: No objection, your Honor.

The Court: Admitted.

(The lease referred to was thereupon marked and received in evidence as Defendants' Exhibit 14.)

Mr. Kester: Q. After the lease was signed then what did you do?

A. The lease was signed on the 7th of May, and I immediately went home to start preparations to come down and take over the property.

Q. Did you still have your ranch in Oregon?

A. Yes.

Q. What arrangement did you make for taking care of that while you were down in California?

(Testimony of Clay Barr.)

A. There was hired help on that entirely while I was down there.

Q. You said your family stayed on the Oregon ranch?

A. My family stayed up there, yes.

Q. When did you come back down to the Meiss Ranch?

A. I came back down on, I think it was, the 9th.

Q. The 9th of May?

A. Yes. I won't swear for sure on that. The 9th or 10th, [153] along there.

Q. When did you actually take over whatever your operation was on the ranch there? When did you start in? A. About the 11th.

Q. When you came down did you bring any other help with you?

A. Yes, I brought several.

Q. Will you tell us who they were.

A. I brought Harold Morter and Perry Morter, and a man by the name of John Kopp, that I can recall at present.

Q. Were they all experienced farmers?

A. Yes; yes, they was all experienced help.

Q. Now had Stevenson already had a crew of men there earlier? A. Yes.

Q. Did some of those stay on?

A. Some of them stayed on and some of them left.

Q. How big a crew did you have to start with when you took over on the 11th?

(Testimony of Clay Barr.)

A. Oh, I would have to count them up. I think there was about ten of us besides myself.

Q. Did that include Bud Stevenson?

A. No.

Q. Did Stevenson have any people working for him besides the ones you have already counted?

A. No. [154]

Q. Now when you came back and started to work around the 11th of May what was the condition of the ranch at that time?

A. It had rained, rained heavy at that time, and out in here, in what we was referring to as the weed patch, there was part of that that there was water laying right out on top of the ground on that piece there.

Q. What was the weather condition from that time on?

A. Most of it was rain and snow, rain and snow both.

Q. How long did it continue to rain and snow that spring?

A. It carried on until the 10th or 15th of June, somewhere in there.

Q. During that first month you were there did it rain and snow pretty continuously?

A. Very continuously, yes.

Q. What did that mean as far as your working the place was concerned?

A. When it was raining and snowing it just shut us down. We couldn't work.

(Testimony of Clay Barr.)

Q. What type of work did you attempt to do during that time?

A. We was working on odd jobs, such as fixing up machinery that we was going to be needing for the coming season, whenever possible.

Q. Did you try to plant during some of that rainy weather? A. Yes, we tried.

Q. What happened? [155]

A. Well, one time we had three tractors mired down out there all at once.

Q. Were you able to get them out?

A. Yes, we took another tractor and used a long cable.

Q. How much equipment was there on the place in the way of machinery?

A. Speaking of the largest articles, there was four tractors, there was four combines, there was five trucks, one set of drills, one set of disks, one heavy disk plow, or Gobel plow, I should say, and some harrows.

Q. Did you bring down any additional equipment or obtain any additional equipment?

A. In the spring and through the spring work there all we brought down was some harrows. The harrows on the place was completely wore out, and in order to do a decent job harrowing I sent one of the boys clear back up to Oregon to bring some down.

Q. From your ranch in Oregon?

A. Yes.

Q. Were you able to get some planting done dur-

(Testimony of Clay Barr.)

ing this wet weather in May and early June?

A. Oh, yes. Whenever it would dry off in the least bit to where we wouldn't mire down we would work day and night.

Q. Did you plant at night?

A. Yes, we planted at night. [156]

Q. How did you do that?

A. Put lights on the tractors.

Q. Was that part of the regular equipment of the tractors?

A. Yes. They was in the shop there. We had to mount them and put them on.

Q. What preparation of the soil were you able to make during that wet weather? That is, what was involved in the seeding process?

A. You mean what all we did before we seeded the ground?

Q. Yes.

A. Of course, during the extreme wet weather we was unable to work at all, but whenever we could we used different articles. We used a light scratcher first to try to drag through the ground and open a little bit so it would dry out. But, first of all, we had to burn all the stubble off before that. Then we would run something light over it there, and then we would use disks on the different types of soil. There would be one place you could do one thing and another place you could do another. Some places you could use a big heavy disk. Other places you used a light disk. Some of it we moldboarded. We even moldboarded a little of it.

(Testimony of Clay Barr.)

Q. Did your drain ditches function well at that time in draining off the water?

A. They was functioning, but mighty slow on account of the weeds. It would seep through the weeds, you know, and get [157] out eventually, but it was awful slow.

Q. Did you keep the pumps going pumping water out of the main drain ditch up into the lake?

A. Yes, we kept them going. We could pump it out as fast as it could get to the pump, but it was so slow working out of the land to get over to the pumps.

Q. Was there anything that could have been done at that time to speed up the drainage in the ditches?

A. No, you couldn't get a dragline in—the ditches was so deep you would have to use a dragline to clean them out, and if you put a dragline out there you would just mire it down.

Q. You spoke of some tractors being mired down while you were doing some planting with them. What do you do to combat that?

A. At the time that we went down there, when I first went down there to take over, I stopped in Klamath Falls and talked to Mr. Stevenson, Sr. He advised me that it was such a wet, late spring that there was what they called paddles—they was 4 by 4 wooden pieces that you would bolt onto the tracks and that would just about double the width of the track of the original tractor. We put those on at times.

(Testimony of Clay Barr.)

Q. Did you put them on immediately after talking with him?

A. No. I went in—I also asked Bud Stevenson about it and told him what Mr. Stevenson said. He informed me that [158] that was just an old-fogey idea the old man had and it wasn't needed.

Q. Did you then delay putting on those boards?

A. We did. We delayed it approximately a week.

Q. Then when you finally put them on, what did you find as to the operation of the tractors?

A. Well, just as an example of what we found, one rainy day when we wasn't able to do anything else we put them on one tractor and we went out in the field out there, and one of the boys hooked onto the drills with the tractor without them on and immediately got stuck, and we took the other one over there with them on and hooked onto the drills and he pulled it right on out.

Q. Then did you go ahead and use those paddles on the tractors?

A. We immediately put them on the second tractor then and used them from then on out.

Q. Can you give us an idea of how much time was lost during May and early June because of the weather in your planting?

A. Through from the time we got there until the end of the planting season?

Q. Yes.

A. I would say that there was over half of it.

Q. Half of it that you couldn't work?

(Testimony of Clay Barr.)

A. That we wasn't able to work at all. [159]

Q. When did you finish the planting?

A. Around the 8th or 9th of June.

Q. Did you go back and re-seed any that Stevenson had seeded before you got there?

A. Yes. We re-seeded not too large an amount, but some.

Q. Where was that?

A. That was on the west side of the place, down along this dike here in the lower end. We re-seeded a portion of that.

Q. That is east of the dobe ground, is it?

A. That is south. The dobe ground is practically north there. This is clear down south, in the southwest corner, where that little chunk of wheat was down there.

Q. You mean the southeast corner?

A. Southwest.

Q. Oh, pardon me. I am sorry. You are right. Now, did you have any discussion with Mr. Stevenson, Sr., about watering the grain?

A. Yes. I asked him one day there in the ranch yard, right on the place there, about watering the grain.

Q. What did he say?

A. He said all this bottom land, old lake bed, that took in the biggest share of it here, he said, "This is a late, wet spring." He says, "Keep the water off of it." He says, "It will start second-growth and stall your harvest off." [160] He says, "You are liable to get second-growth up in there,

(Testimony of Clay Barr.)

and if you get early rains in the fall," he says, "it is possible that you may never harvest part of it." He also said on this dobe ground along this side, he says, "We did water a little of that in different places from time to time, and you could put some up there, but be sure and not let it get down into any of the bottom ground."

Q. Would you describe that dobe ground so far as any preparations for irrigation were concerned.

A. The only preparation that had been made for irrigation was at the end of this east-west ditch here. They had a pump put in there and a pipe to boost it up approximately a third of the way across this 400 acres. At that point they would just take and open the ditch and they would run it out one way or the other, and then they would just plug the ditch up and run it over the side and let it run a while, and move it down and run it over again.

Q. Had any of that ground been leveled or graded for irrigation?

A. The only part of that property that had been leveled or graded for irrigation was up in here on this chunk that wasn't seeded at all, that they had seeded into alfalfa with the intention of trying to get some irrigation from this upper well up here. There wasn't none of that in crop that had been leveled or smoothed, to my knowledge. [161]

Q. Would you describe what you could do in the way of irrigation in that dobe ground in view of the condition of preparation there.

(Testimony of Clay Barr.)

A. Well, you could pump it up onto this, into this first ditch. Your water come in out of the lake over here. You would let it back into this ditch, and it would come across to this pump here and you could pump it up there. And, as I say, you could run it both ways from that in a little ditch and just plug it up and let it run over for a while, and then you could move down the line a ways and plug it up again and just let it run back downhill towards your bottom land. You also could take it from that pump in an open ditch back down and run it along another small ditch and down along this canal on the extreme west side of the field the potatoes was in, and do the same thing, letting it run off.

Q. Now, would there be any way of controlling the water once you pumped it out of the ditch to get an even spread of it?

A. I don't know just how you would do it. You could get out there with a shovel and dig a few ditches to run it here and run it there, to try to divide it a little bit, but it was very unsuccessful.

Q. Did you have any discussion with Mr. Stevenson, Sr., about spraying? [162]

A. Yes.

Q. What was that?

A. I asked him about spraying, and he told me that there had never been any spraying did on the place; that this piece that had weeds in it over here had went to weeds the two last years they had raised crops there, but if the weather conditions permitted he would recommend spraying.

Q. Now, when you first came down and were

(Testimony of Clay Barr.)

starting to seed what did you do as far as any more seeding on the dobe ground was concerned?

A. I stopped seeding immediately on the dobe ground.

Q. Why was that?

A. This ground down in here was your good land, the bottom lake land. That was where your production of your ranch was concerned. It was late, and that was the ground that needed the care to get the crop into. This dobe ground up here wasn't going to produce you but very little, it was plain to see right at that time, so we allowed no more seeding there.

Q. You mean you concentrated your efforts on the other?

A. Yes, keep all your efforts down into the good land.

Q. What did you do then with what was left of the dobe ground that had not been seeded?

A. After we had completed our seeding we went back up and plowed it up to keep down the weeds and wild oats and things [163] from growing.

Q. Was there much wild oats up in that part?

A. There was a lot more wild oats than there was tame.

Q. Would you indicate the area where the wild oats were thickest?

A. It took in the entire 400-acre field here, that the wild oats was on.

Q. Is there anything you can do about those wild oats?

(Testimony of Clay Barr.)

A. Yes, you can cultivate them out before you seed.

Q. If they are not cultivated out before you seed, then is there anything you can do?

A. No, there is nothing you can do. There is no spray that you can use on wild oats without killing the tame grain.

Q. About how many acres were in that patch that was summer-fallowed up in the dobe ground?

A. Between 60 and 70 acres, I would estimate.

Q. And the rest of the 400 acres, then, had all been planted before you got there?

A. Yes.

Q. Now, you spoke about re-seeding some ground that Stevenson had seeded west of the potatoes there. What was the reason for that?

A. The rains and the snows and the wet weather had soaked in on that there and flooded it out. It came up, but the ground was so wet that it killed the grain. [164]

Q. Where did you do that re-seeding?

A. That was the last seeding we did. We went back and re-seeded that corner down there.

Q. After everything else was done?

A. Yes.

Q. Did you have a commercial sprayer out to look at the place? A. Yes.

Q. Will you tell when and what occurred.

A. He came out to solicit work, Mr. Liston, about the middle of May, or such a matter, between the 15th or 20th of May, or along there someplace.

(Testimony of Clay Barr.)

At that time, why, it was too wet and too early to be doing any spraying. The grain wasn't ready. So I told him I would get in touch with him later.

Q. Did you get in touch with him later?

A. I did.

Q. What happened?

A. I phoned him around the 1st of July, or the last few days of June, or something on that order that I would like to have some spraying done. He come down and took a look at the amount of ground he would have to cover.

Q. What happened then?

A. He came down and we went out and went over the biggest share of the place where we was able to drive with an automobile. First of all, we went over what was the bad weeds in [165] that complete section of ground there, and we tromped around over it all afternoon looking at it. The weeds was so bad and the grain was up so poor in there all the time that the weeds had got ahead of the grain. The weeds was up bigger than the grain. And at that time the grain, as he explained to me—he took off part of it and explained it was just starting into the boot stage. He said, "If you put on enough spray to kill those weeds you would never harvest any of the crop. It would kill the head."

Q. You spoke of the grain being sick there. What was the matter with the grain?

A. It was too weedy, was my opinion of it at the time, along with poor land, alkali condition, and

(Testimony of Clay Barr.)

the extreme wet spring that had kept the grain down, sick and yellow, most all of the spring.

Q. Was there any time during the spring when the grain was healthy enough to stand spraying?

A. It rained along to the 10th or 15th of June there, and there was no opportunity at all. The grain was just very sick and poor, and then when it quit raining it started kind of coming out of it a little bit. And someplace along there a person has to take a guess at what they think might be the right time that you could stand a shot of spray without harming that grain. I took my guess, and he recommended not spraying. [166]

Q. You spoke about alkali in the soil there. Would you describe the condition of the soil on the ranch there in the different areas?

A. Your ranch as a whole there—your bottom land is considered peat soil. All the way along your dikes, clear through, there was an alkali condition come all the way down along it and worked out into this lower field down here, the heaviest spot. Your dobe ground all laid up on the west side. Between where your old lake bed was and up the hill as far as it was farmed, that was dobe.

Q. Now was that dobe ground good grain soil under any conditions?

A. Not in my opinion.

Q. In order to make a crop bear at all what would have to be done in the way of preparation of the soil?

A. I don't believe you could raise a good crop

(Testimony of Clay Barr.)

on it. There might be a chance if you would completely smooth that out and get fresh water for irrigation and dig your ditches, your rills, every three feet down over that and really irrigate it with the recommended fertilizers and one thing and another. Then you might raise a crop. I don't know for sure.

Q. Had that ever been done up to the time you took over the property? A. No.

Q. What would the effect be of soil preparation beforehand, [167] fall plowing and cultivating, and so on?

A. You could raise a fair crop, I would say, maybe, if you would fall-plow that ground, and then in the spring of the year when the wild oats would start if you would get in and cultivate it and work it several times, work out all these wild oats, and build you a seed bed and mulch on top of your ground, and get it down there six or eight inches deep there for your seed to work in, you might raise a fair crop there.

Q. Had anything like that been done by Stevenson before he planted it?

A. In that year?

Q. Yes. A. No.

Q. Down in the so-called weed patch, that 700 acres or so in the southeast part, was that soil really fit for grain at all?

A. I don't think that soil there will ever raise any grain.

Q. Did you make any study of the soils there in

(Testimony of Clay Barr.)

connection with what tests the Government might have made there, and so on?

A. Not before I took the lease. I did afterwards.

Q. Did you obtain information from the Soil Conservation Service about their tests on this soil?

A. Yes. I obtained a map, a soil analysis map, and in [168] there they have figures—I was unable to read them, and I took them to them and had them read them to me.

Q. Is that map that is below there on the board one of those maps?

A. Yes, that is one of them right there.

Q. Would you explain the different colorings there so far as the Soil Conservation Service soil analyses?

A. He told me that this was their map, and they had made it up. Your soil conditions as they show them is 1, 2, 3, 4, and on down the line. Your yellow soil down here, he says, is your No. 2 soil, your red is your No. 3 soil, and your blue is your No. 4 soil. That is the way he quoted it.

Q. Was there any No. 1 soil on the place?

A. No, not according to that map, there isn't any No. 1 soil on the place.

Q. Now, the red area there, does that correspond generally with the land immediately west of the dike?

A. Yes. That is the land that he pointed out that I would find an alkali condition in. It runs all the way along the dike, next to the dike.

Q. This 1, 2, 3 and 4 category, which way does

(Testimony of Clay Barr.)

that go? Which end of the scale is good and which is bad?

A. No. 1 is your first-class land, and so on down the line. The bigger the number the poorer the soil.

Q. Is the No. 4 soil good for anything, to speak of? [169]

A. No, No. 4, he told me, wasn't good for anything.

Q. Now, did you go back and try to re-seed the weed patch area there?

A. No, I didn't.

Q. Why not?

A. I figured it was too late to ever make a crop. If it had been earlier, it was definitely the thing to do, but I figured it was so late that it would never get around to make a crop.

Q. What time was it by that time?

A. That was after we got through seeding the 10th of June, or such a matter, or the 12th, along there.

Q. About how long does it take for a crop of barley or oats to mature down there?

A. I have always understood and read that it takes about 120 days to mature up a crop of oats or barley.

Q. Was that your experience that year?

A. We got in part of it a little bit earlier, but that there was awful close. It would depend a little bit on your condition of wetness as to how fast it would mature along.

Q. Now, from the time you came down there

(Testimony of Clay Barr.)

on the 11th of May how long did you stay there on the place?

A. I was there until the seeding was—until the day before the seeding was over with there. Until the 7th, I should say, the 7th of June, I was gone from the place once. [170]

Q. Just once. Where was that?

A. I drove up one evening to the ranch in Northern Oregon and back the next day.

Q. Then from the time the seeding was over—or, rather, you said the 7th of June. Where did you go on the 7th of June?

A. I went to Spokane.

Q. What was that for?

A. We had a legal argument coming up in court in Spokane and I had to be up there.

Q. Was that the case that Mr. Tonkoff sued you in up there at Spokane?

A. Yes, that is the case.

Q. How long were you in Spokane for that case?

A. I left up there the evening of the 10th.

Q. Was that the occasion on which the settlement was made which disposed of the crop on the place? A. Yes.

Q. Then where did you go from the 10th of June?

A. I came back down and spent the night at my home, and went back down to the Meiss Ranch the next day.

(Testimony of Clay Barr.)

Q. Then how long did you stay at the Meiss Ranch from then on?

A. Until about the 20th.

Q. The 20th of June? A. Yes. [171]

Q. Where did you go from then on?

A. I went back to the Northern Oregon ranch.

Q. How long were you there at that time?

A. I was up there the biggest share of the time until the harvest was ended up there.

Q. In other words, you went back to your Oregon ranch to take care of the harvest up there?

A. Yes. We had to get prepared, get the machines and trucks ready, and I went back up there.

Q. What period of time did that cover?

A. We started the harvesting along the 12th or 15th of July and ran until about the 8th of August.

Q. Now, between the time when you came back from Spokane about the 11th of June until you went back to your Oregon ranch for the harvest what was the situation on the Meiss Ranch? What was the condition of the crop? What were you doing?

A. What was we doing? We went over on the north side, clear out into the sagebrush over here and this lake that was here, there had been a canal built down north in here, I understood by Mr. Stevenson, Sr., before he sold the place, with the intentions of taking water out to dump on this sagebrush land for the purpose of lowering the lake

(Testimony of Clay Barr.)

for the protection of your levee and flooding conditions on the farm land.

Q. Was there danger during that time that the levee would break? [172]

A. Oh, there was definite danger. There was places along that levee there it was so thin that you walked single file—you couldn't walk side by side—to keep the water from breaking through.

Q. How high was the water in the lake at that time?

A. On a windy day it was splashing over the top.

Q. Then in order to get rid of that excess water what did you do?

A. We went out here and we built a canal approximately 40 feet wide, and took two tractors and bulldozers and we put them in the middle of our canal, and we rooted the dirt both ways, and we would root it up, oh, probably 10 feet high on each side, and left the center about 40 feet wide. We built it approximately a half a mile, clear over to the line fence over here, and we laid in pipe into that down at ground level and let water out on both sides of that canal there, and set a pump in over here for the purpose of pumping it over in there and disposing of the water out over the sagebrush land.

Q. Did that have the effect of lowering the levee and protecting the dike?

A. Oh, yes. Every little bit helped. We was doing everything we could do then to keep the

(Testimony of Clay Barr.)

water down. Mr. Hofues and Kirschmer had two drainage wells dug way over here on the extreme east end, out in some Federal land, to put water down in the ground. And we was wasting water out into the peninsula—what we called the peninsula—whatever it would take. We was doing just about everything we could, to string the water in every direction we could, in order to get the water level down and keep it down.

Q. What was the condition of the crops during that time?

A. The crops around the 10th to the 15th of June, the rains had let up and stopped, and the crops started perking up and looking better.

Q. Did they seem to be coming along all right?

A. They seemed to be coming along pretty fair with the exception of dobe ground. That never did look good, or the weed patch.

Q. Did you keep the pump going to dispose of that excess water up on the sagebrush?

A. Yes, we run that pump steady. I think it ran there for about 30 days straight without being shut off day or night. It was pumping approximately 8,000 gallons a minute out of there. The only reason that it was shut off at that time was we soaked up so much of that sagebrush ground that it was working its way around and coming back to the lake again.

Q. During that time was there any lack of water down on the cultivated ground?

A. No; no, there wasn't.

(Testimony of Clay Barr.)

Q. Did you look around from time to time to see what its condition was? [174]

A. Yes, I was down there every few days looking around.

Q. What was the condition of the soil in the bottom land there?

A. The bottom land around there had plenty of moisture. You could go out there any time through the summer there, clear up until harvest, and just kick your toe into wet dirt.

Q. What was the condition up on the dobe ground?

A. That got dry along towards summer.

Q. Did you do anything about it getting dry up on the dobe ground?

A. Along about the 1st of July Mr. Herman of Spokane phoned me—I don't know, but I say that was approximately the 1st of July; I don't know the date—he phoned me and told me that Mr. Tonkoff had called him saying there was needing to be some irrigation done up on that high ground.

Q. Pardon me for interrupting. But at that time where were you?

A. I was up at Mikkalo.

Q. That was in connection with the harvest on the Oregon ranch? A. Yes.

Q. Go ahead.

A. I told him there was only one thing to do, and that is for all of us to go down and take a look if they was in doubt. I told him to make a date to see if they couldn't all get together and go

(Testimony of Clay Barr.)

down and to call me back, which he did the next day. He told me that Mr. Tonkoff was going to fly his airplane over to Arlington, and that he was unable to come along, and to go down and size the situation up and see what we thought about it.

Q. Did you do that? A. We did.

Q. Who all went and how did you go?

A. When I went down to Arlington there and met Mr. Tonkoff, Mr. Welch was also with him, and the three of us flew to Klamath Falls.

Q. You flew in Mr. Tonkoff's plane?

A. Yes.

Q. Then what did you do?

A. We got us a ride out of Klamath Falls there with a man I knew and went out to the ranch out there that evening. That evening there he and Mr. Welch and Bud Stevenson went out and they went all over the place that evening. I also went all over it but with the man that I had got the ride out from Klamath Falls with. I was showing him the crops and the ranch where I had the lease, and I went all over it there, but I didn't go with them. The next morning Mr. Tonkoff came to me alone, and he said, "What do you think about the irrigation out there?" I said, "Well, let's jump in the pickup and we will go out." And we did. We went into the field and turned down along the south side of the ranch, along the potatoes there, and went up the west side—yes, went up the west side—and we stopped in a couple of different places along there, and we walked out into it and kicked down

(Testimony of Clay Barr.)

into the soil there a couple of inches. It looked dry on top, but underneath there was moisture. His remark was that it didn't look too bad.

Q. Whose remark was that?

A. Mr. Tonkoff's. He and I was alone.

Q. Just where was that?

A. That was in a couple of different places, oh, along on the west side of the field that the potatoes was in. We then went up to the pump up here on the dobe ground and in this 400 acres there. He says, "What about this?" He says, "This is looking dry here." He says, "There is a few little cracks in here starting," he says. "Isn't that dry?" I says, "Yes, it is dry, but," I says, "let me explain about the means of operating this place for water." I said, "The only water you have available under my portion of the place, on instructions from the landlord, was to use the lake water if I wanted to do any irrigation, for the simple reason the wells was assigned over to the potatoes and the pasture, and they was afraid that if there was any shortage of water they would get into a law action with them and they directed me not to use it." So I said, "You can draw the water out there, and you can bring it across here to this pump and you can pump it out on top of this ground and you can let it go," I says, "but you don't dare let any of it get down into this bottom land down here, into the good lake bottom." And he said, "Well, how about it? Don't you think we ought to try a little of it?"

(Testimony of Clay Barr.)

I says, "Yes, I will try a little of it, but I won't guarantee you I am going to irrigate that land at all." And I says, "What's more," I says, "if you and Mr. Welch and the rest of them are interested in this—or dissatisfied in the way I am operating this place, give me the expenses I am out from June 10th on and you take it over." He says, "No, no. You are doing fine. We don't want nothing to do with it."

Q. That was Tonkoff that said that?

A. That is Tonkoff that said that.

Q. All right.

A. We then got in the pickup and we drove out through that middle dike and came down along the weed patch, at which time he never said anything about weeds, after I told him he could take it over.

Q. After that time did you ever have any conversation with Tonkoff at all about the condition of the ranch? A. No.

Q. Did he ever make any complaints to you at all?

A. No, he personally never made any complaints. I got a complaint around harvest time which was his complaint, but it didn't come from him. Mr. Herman called me and wanted to know why we wasn't starting harvesting, something after the 1st of September, and I told him that it was simple; it just wasn't quite ready.

Q. Now while you were gone up in Oregon to

(Testimony of Clay Barr.)

attend to your harvest on the Oregon place what arrangements did you make for the care of the Meiss Ranch while you were gone?

A. I went back over to Bud before I left out there, and I approached Bud—I had a man down there all the time——

Q. Who was that?

A. A man by the name of Jeff Williams.

Q. All right. You approached Bud?

A. And I approached him on going in and cleaning out this ditch; that the mud was in the ditch here so high that it would have to be cleaned out before the water would come from the lake over there, in order to keep it off of the land out here further, and start the pumps so he could be doing a little irrigating along there. And I also told him I would be back down in a week or so with another man to help us with it and see what could be done.

Q. After your conversation with Tonkoff when you were talking about water, and so on, did you do anything about putting water on the dobe ground?

A. When I came back down then—— [179]

Q. By the way, when did you come back down after that?

A. It was around the 12th to the 15th, somewhere along there, of July when I came back down.

Q. All right. What did you do then?

A. I brought down Perry Morter with me, as

(Testimony of Clay Barr.)

I agreed to do, and we went out and we went all over it. Bud did what he said he was going to do. He cleaned out that ditch there just enough to get the water over to the pump, and then he and my man was watering along through there in different places. They watered all the way down along this road where the field is that the potatoes was in. Then they watered—as I say, they pumped it up here about a third of the way, and they had been running it out both directions at that time. And we went all over that, the two of us. We tromped out in there and we found as we tromped out in there that watering this hard ground was just like dumping it on this floor; it would just go over into a little low spot and run off down into the land where you didn't want it. Where the water was running at the time, we went down there and we walked out into it, and it was down into that low land, and we tromped in water there six or eight inches deep that was in the low swale out there.

Q. This was what time of the month again?

A. About the middle of July. We went over where they had been watering and the water had gone too far down and worked [180] into the good ground. And the mud there was up to your shoe tops out in there. So we talked it over and kicked it around this way and that, what we thought was the right thing to do, and we made the suggestion that maybe they was leaving it in one place too long; they wasn't moving it often enough. So I left him in charge there to go ahead and try it,

(Testimony of Clay Barr.)

keep moving it, spread it and work it along there, and to call me the next day.

Q. Pardon me. Who is this that you are referring to?

A. Perry Morter.

Q. Perry Morter. Go ahead.

A. — and to call me the next day. So he did. The next day he called me there and told me that you couldn't turn the water out fast enough, you couldn't move the water fast enough to keep it from running down to that land, so I told him to shut it off.

Q. Now during the summer there did Bud Stevenson do anything towards helping run the place? A. Very little.

Q. What did he do?

A. About all he did there for me, for my assistance at all, was clean that one ditch out there a little bit for 50 yards with the dragline and start that pump so my man could be watering. He helped get water around for the potato man and maybe helped on the pasture for water. I don't know.

Q. Did he do anything on the grain part of the place aside from that one job of cleaning out the ditch and turning on the pump? A. No.

Q. What was your relationship during the summer there between you and Bud? How did you get along? A. Well, not too satisfactory.

Q. What was the difficulty?

A. Oh, the feeling of it was there that I butted

(Testimony of Clay Barr.)

in there and kind of knocked him out of a good job, I guess, and he was sore about it.

Q. Did he cooperate with you at all during the summertime except for that one job? A. No.

Q. Now that time that you brought Perry Mor-ter down did you go out and look around the weed patch there, too?

A. Yes, we went all over the weed patch.

Q. What was the condition there?

A. That was after we had recommended—before the spray man said that you couldn't go in and get it sprayed, so we went out to see how much grain there actually was out there. It was thin and poor. In places there wasn't any, and we picked out a patch there that we considered all weeds and no grain, and decided to plow it up to keep down the weed seed from the rest.

Q. Did you plow up some of it? [182]

A. Yes.

Q. How much?

A. Oh, everybody has got their guess on how much we plowed up there, but approximately 100 acres in that weed field.

Q. Now would you tell us all of the ground that was not in grain at the time of the harvest there that was plowed. Tell us the different fields.

A. At harvest time?

Q. Yes, at harvest time.

A. Yes. There was this field in the dobe ground up here that they had planted to alfalfa, and it

(Testimony of Clay Barr.)

had a poor stand on, and we plowed that up, approximately 60 to 70 acres there.

Q. What was the reason for plowing that up?

A. In making summer fallow out of it?

Q. Yes.

A. The reason for that was we didn't have time to give it the proper cultivation. That was robbing good land down here on the dike. By the time we got the good land planted it was too late to go back up and get any crops seeded up there, so we what we call summer-fallowed it.

Q. Go ahead and tell us the other patches.

A. We plowed up a strip on the north side.

Q. Had that previously been seeded?

A. No, that had not been seeded. We left it out from the seeding.

Q. Why? [183]

A. It was alkali land in there under extremely poor cultivation, see, from the year before, and it had a lot of foxtail in it. It would have taken a lot of cultivation and work, and we plowed it up to make summer fallow, figuring that we might stand a chance of getting a good crop on it next year.

Q. All right. Go ahead.

A. And we also plowed a strip just north of the main dike, a small piece. I don't know the acres exact. Also, next to the dike——

Q. Was that alkali ground, also?

A. That is the same deal, yes. And that hadn't

(Testimony of Clay Barr.)

been in—neither one of these pieces here had been in crop the year before at all.

(Thereupon an adjournment was taken until

Friday, October 28, 1955, at 10:00 a.m.)

Portland, Oregon, October 28, 1955, Court reconvened, pursuant to adjournment, and proceedings herein were resumed as follows:

CLAY BARR

one of the Defendants herein, resumed the stand and was further examined and testified as follows:

Direct Examination—(Continued)

By Mr. Kester:

Q. Mr. Barr, there has been put in evidence here a letter which you wrote to Mr. Tonkoff and Mr. Herman advising them of an approximate harvest date. Will you explain the circumstances surrounding that.

A. According to the agreement in which I assigned them my interest in this crop, it called for me to notify them at least ten days ahead of the harvest season—that is, the beginning of harvesting. And I wrote that letter trying to give an approximate date.

Q. At the time you wrote it did it appear that the date mentioned there would be the approximate beginning of harvesting?

A. It could possibly be.

Q. That letter mentions that the harvesting would begin on or about the 1st of September. Did

(Testimony of Clay Barr.)

it look like that would be when the harvesting would start?

A. Yes. It couldn't start before that, I knew.

Q. When did you finish your harvesting on your Oregon ranch?

A. About around the 7th of August.

Q. What did you do immediately after that?

A. We went directly to the Meiss Ranch.

Q. Whom do you mean by "We"?

A. Some of the boys that was working with me also went down and helped with the harvest.

Q. How many men did you take with you from the Oregon place to the California place?

A. There were three men off of the Oregon place went with me.

Q. Did you take down any additional equipment besides what was on the Meiss Ranch already?

A. Yes.

Q. What did you take?

A. A truck and harvester, self-propelled harvester, down there.

Q. A combine?

A. A combine, and three extra trucks, and also went out and rented a machine, a self-propelled combine.

Q. What was the reason for needing extra equipment?

A. Under my terms of the lease I wasn't called upon to use anything but the equipment that was there, but it was a late season, the rain could set in and catch us, and all the machines that was

(Testimony of Clay Barr.)

there was all pull-type machines, had a tractor on, and when you harvest that country down there you have to kind of harvest it as it gets ripe. If there is five acres ripen up, you will harvest that, cut it out and harvest it, or 100 acres, or whatever piece you have ripen up first you will harvest it. You need a pusher to go around and open that up. If you take a combine, a pull combine, there will be with that combine going through—there look at the waste you would have all over around on those pieces.

Q. Just explain how there would be waste from using a pull-type.

A. The tractors and combine wheels just run over it and tromp it into the dirt.

Q. Is that true with a self-propelled combine?

A. No. A self-propelled combine has its header in front of the machine and picks everything up, while your pulling machine has the header onto the side.

Q. So that the use of a self-propelled combine prevents waste of the grain?

A. That is right.

Q. What was the situation about the beginning of the harvest there at the ranch? When did the crop get ripe and what did you do about it? Just tell us about that.

A. We pulled our first machine out on the 8th day of September and started cutting, and we cut out a little bit with one machine, and then as the grain gradually kept getting a little riper we kept

(Testimony of Clay Barr.)

adding a few machines, and had them all running within a week.

Q. Could the grain have been harvested any earlier than you did start?

A. No, I would say that was just a little bit too early then.

Q. Were you ready to start at an earlier date?

A. Oh, yes. We was sitting around there for two weeks ahead of the harvest there, just kind of making work for the men and waiting on it.

Q. What type of work did you do while you were waiting for the grain to ripen?

A. Oh, it was just the machinery and equipment, fixing it up and getting ready, and different things like that.

Q. Now, by the beginning of the harvest was there any new arrangements made about the future operation of the ranch?

A. Yes. The Farnham brothers came in and took over my interest under the lease before the harvest had started, so that as soon as I got the crop off there, why, I was relieved of the duties of the ranch.

Q. What was your arrangement with the Farnham brothers?

A. I sold them my interest in the lease, just as it called for, and they was to take over.

Q. When was that assignment made? [188]

A. I think it was, oh, in the last week of August; something like that.

Q. When was it to take effect?

(Testimony of Clay Barr.)

A. I think it called for October 1st, or as soon as the crop, the '53 crop, was completed—the harvest was completed.

Q. In other words, you were still there during the '53 harvest? A. Yes.

Q. They took over following that?

A. They took over following that.

Q. Did you get the consent of the owners to that assignment of the lease? A. Yes.

Q. Did you have to make a trip in order to do that?

A. Yes, I made a trip to Denver.

Q. When was that?

A. I think I went there about the 5th of September.

Q. And did they consent to an assignment to the Farnhams?

A. Yes, they consented to the assignment.

Q. Then when did you get back from that trip?

A. I got back about the 9th.

Q. Was that about when the harvest started?

A. Yes.

Q. Now, would you explain how the harvest went. You mentioned starting a little bit here and there. Just describe the conditions during harvest there and what you did. [189]

A. Well, your first grain to ripen up was the short crop along the dobe ground. We worked that out first up there, and then we just looked for a piece that was ripe next, regardless of how big it was. You cut around it and harvested it out, and

(Testimony of Clay Barr.)

by the time that was done there would be another piece ready, and so on through the harvest. We left the weeds until last. We cut all the good ground first.

Q. Did you get completely ripe grain from the very start?

A. No. We had to store it in the elevators there, because there was a little too much moisture to put in a boxcar. We double-handled it, what you call it. You put it into the elevators, put it in and dry it out, and take it to town and dump it out of your truck and put it up in another elevator, giving it time to air out and reduce the moisture content in the grain.

Q. How much storage facilities were there on the ranch?

A. I think there was—I don't know exactly, but I think there was about 12 round bins holding about 3,000 bushels apiece, plus a big, flat Quonset storage shed.

Q. What was the first portion of the crop that was harvested?

A. The dobe ground there—or wheat, I should say, was the crop.

Q. Would you indicate on the map the wheat area that became ripe first. [190]

A. I think the first piece was approximately 40 acres that laid on the hill, actually up in the pasture, a little bit above the water line, right in there, which was seeded to wheat.

Q. In the southwest corner?

(Testimony of Clay Barr.)

A. In the southwest corner of the ranch. Then the other patch of wheat was here, just in the southeast corner of the dobe ground. It was 400 acres. And then the harvest moved on over into the oats. The rest of the dobe ground was seeded to oats, and we moved into that.

Q. What kind of production did you actually get off the dobe ground? Can you estimate what the crop was like or describe the condition of the crop at harvest time?

A. There wasn't too much on it. I know we put it all in one of those bins.

Q. One of the 3,000-bushel bins?

A. One of those 3,000-bushel bins.

Q. It all needed to be dried some, did it?

A. Oh, yes. Yes, it was damp.

Q. Then after the dobe ground where did you harvest next?

A. We moved down below the dobe ground and started working in along the edge of this field through here.

Q. That is immediately east of the dobe ground?

A. Immediately east of the dobe ground.

Q. Now from that time on did the harvest move more or less steadily, or was it interrupted? [191]

A. No, we had good harvest weather, and it moved along very steady. We had pretty good dry weather, and we was able to keep all the machines running, and we had a very successful harvest.

(Testimony of Clay Barr.)

Q. You had six combines going, did you?

A. Yes.

Q. Whom did you have for operators on the combines? Were they experienced farmers?

A. I had the best I could find. I went up into this northern country up here, and I got operators that wasn't out looking for harvest jobs. They was men working on big ranches, working the year around. I actually had to go to the men they was working for and get them to let the men come down for me. That was the best that could be had.

Q. Did you operate all six combines at once?

A. Yes.

Q. All the time?

A. The biggest share of the time.

Q. How did you operate with respect to the difference between the self-propelled combines and the pull-type combines?

A. The self-propelled, of course, as I say, always went around to open up the fields first. Then they would either cut themselves off a little piece to work, or sometimes they run right along with the pull machines. [192]

Q. What is the fact as to whether there was any excessive waste of grain in the harvesting process?

A. There wasn't any excessive waste in the harvest fields. You take on any machine when you are harvesting grain you have to set your machine accordingly to save the grain that you are in. I was personally on each and every machine to help start

(Testimony of Clay Barr.)

it out, and I venture to say I think pretty near every day I was out there checking for waste. Most of it is done through the threshing of it. Well, first I should explain that. You run your grain through the cylinder to divide your heads from your straw. That leaves your kernels of your grain and your chaff together. That goes back onto the chute and then you divide it with wind. You put on enough wind to blow that light chaff and trash all out of the grain and leave the kernels, which is heavier, and they drop down through and into an auger and go up to the top of the machine. Now there is always a little bit of question in there that if you put on enough wind to blow all the trash out you lose a few of the light kernels, that is real light. That isn't much damage to you, because there is very little wheat in it. But you will lose a few. If you shut your wind down enough to save those, you are going to get the trash into the grain, and then you will get docked.

Q. By dockage you mean the price goes down?

A. Yes. They will dock you for having trash in your grain. But there was no excessive waste.

Q. Did you personally yourself observe each of these machines?

A. Yes, I was on them with the boys that was running them there.

Q. Did you observe their operation to see whether there was grain coming out onto the ground?

A. Oh, yes. I had straw down my neck every

(Testimony of Clay Barr.)

day of the harvest out there from being under those machines looking for waste.

Q. What about this weed patch that has been mentioned? Will you describe the harvest in that area.

A. The weed patch—I left during the harvest at the time they pulled over into the weed patch, and I wasn't there at the time of the harvesting of that. But I was in contact with them every day.

Q. Pardon me for interrupting, but what time of the harvest was that?

A. That was the last thing. Everything was cut except the weed patch.

Q. Why did you leave that to the end?

A. That had the least grain in it there.

Q. Now, then, would you go ahead and explain the harvest in the weed patch.

A. The harvest there—I told them now that that was a very tough job, and they all knew it. I told them we was going to make an extreme effort to get everything that was humanly possible, and I think everybody will agree with me we did more than was called for.

Q. What do you mean by that?

A. Out there wallowing around in those weeds, when there wasn't any grain to get, just trying to get just a little bit. Because it wasn't our crop. I wouldn't have did it if it had been my crop.

Q. You mean if it had been yours, you wouldn't have tried to harvest it?

A. Loss of time to find these healthy heads,

(Testimony of Clay Barr.)

and there was part of it we harvested that didn't pay for the labor that was out there to get it.

Q. When you are harvesting weeds like that, what does that do to the combines?

A. They constantly plug up. You get a lot of green weeds in your machine, and it grinds up in the elevators and augers. It just plugs the elevators and augers up.

Q. What do you have to do then?

A. Open the elevators and dump it out on the ground.

Q. That stuff, then, that is dumped out. I suppose, is a mixture of grain and weeds and so on?

A. Yes. It depends on just where you was at. Sometimes it would be all weeds; sometimes there would be quite a little grain in it. If there was enough grain in it, the boys would pick it up. If there wasn't too much, why—the biggest share of the time it was mostly weeds and, why, they would just leave it in a pile there.

Q. What would be the effect if a cow got into that mixture of green weeds and grain?

A. That was a serious condition from a cattleman's point of view there. Grain and green weeds ground up together creates a bloating condition, and it is a serious condition.

Q. Did Mr. Stevenson, Sr., run his cattle in there right behind the harvest?

A. As soon as we got out—the pasture was all his—he started to pasture the place as soon as we got our machines out.

(Testimony of Clay Barr.)

Q. How much of the grain did you have to put in bins like you have described for the purpose of giving it a chance to dry?

A. Oh, that would be hard to estimate.

Q. Do you remember how many times you had storage spaces with grain in them?

A. We stored quite a lot of the grain. It sometimes wasn't all due to damp grain. Sometimes we couldn't get boxcars to load out over on the railroad. Instead of holding up the harvest, why, we double-handled the grain by storing it in those bins and then picked it up and hauled it later. [196]

Q. And that increased your operating expense?

A. Oh, yes. Whenever you double-handle grain your operating expenses increase.

Q. You mentioned a storage shed. Did you have occasion to use that?

A. Yes, we used that one time. Just north of the ditch, that main ditch there, why, there was a field of oats out in there that was just—it was pretty green. I took it over and had it tested two or three different times, and they wouldn't take it.

Q. Pardon me for interrupting. What kind of a test are you referring to?

A. Moisture-content test.

Q. By the buyer?

A. Yes, by the buyer. Kerr-Gifford Company bought the grain there, and they didn't want it at that high-moisture content.

Q. All right. Go ahead.

A. It come to a question of either quitting har-

(Testimony of Clay Barr.)

vest and waiting for it, to try to ripen it, and having the danger of getting caught with rains, or doing extra work in drying it. So we cut it and we dumped it over the floor of that big storage shed there so the air could work down through it, and that was later picked up. And even part of that had to be hauled and put through a drier for still having too much moisture content. [197]

Q. Speaking of the crop generally, did you get it harvested as quickly as it was ripe enough to harvest?

A. Yes, we was right on top of it whenever it was ready, and a little bit before, as I say.

Q. Did you have adequate help to do the harvesting? A. We had plenty of help.

Q. Did you have enough men to run the machines that were there? A. Yes.

Q. You mentioned another machine that you went out and got. What arrangements did you make for that extra machine?

A. I rented that. That was Mr. Stevenson, Sr.'s, combine, which wasn't in use that year, and I rented it by the day and paid him cash rent by the day for the use of it, and my men run it.

Q. The assignment to Tonkoff and Herman reserved the sum of \$15,000 for harvesting expenses. Did your harvesting expenses run more or less than \$15,000?

A. I run just a little bit over it.

Q. So you actually had more than \$15,000 in the harvest?

(Testimony of Clay Barr.)

A. Yes. I figured it up, and it was just a few dollars over sixteen thousand, was the exact dollars of it.

Q. Now there has been some talk here about a loss in hauling the grain in to town. Can you explain first what the arrangements were for transporting the grain. [198]

A. On the place there was four trucks equipped for hauling grain that had been used on the ranch for several years. They was all equipped with wooden beds and wooden racks, all factory-made.

Q. Regular grain bodies?

A. Regular grain bodies, and they was good equipment. Mr. Stevenson had good equipment for that. The ones that we brought down, we had a steel tank on one of the trucks and the other two was similar to what he had.

Q. So you had seven trucks hauling, did you?

A. Yes, we had seven trucks around there all the time.

Q. Of which three were provided by you personally?

A. Yes, three of them was.

Q. Now, were those dump trucks?

A. All but the one with the steel tank. That dumped out at the bottom. They all had hoists on them to dump.

Q. What was the process of handling the grain from the combine until you got it loaded? What did you have to do?

A. You mean into the boxcar?

Q. Yes. A. All the way through?

(Testimony of Clay Barr.)

Q. Well, for instance,—

A. Your grain on the combine, of course, is put into a tank on top of the machine and augered out of the bottom of the tank right over into the truck. You just drive a truck into it and dump it in. Then if you haul direct to the railroad he had a pit built into the ground, a concrete pit, that you could drive across the top of and dump it into that pit, and it went up an elevator, a bucket-line elevator, up over the top of the boxcar, up high enough that when it dropped by gravity it would go into the car.

Q. That pit was at Macdoel, was it?

A. Yes, that was at Macdoel.

Q. Was that a part of the ranch facilities?

A. Yes, that was a part of the ranch facilities.

Q. Did they also have scales there for weighing?

A. Yes, they had scales there for weighing.

Q. How long a haul was that from the ranch to Macdoel?

A. It was about five miles.

Q. What kind of a road was it?

A. It was a graveled road and ungodly rough. That is about all I can say about it.

Q. There has been some mention here about grain spilled along the road. Did you observe whether or not there was any unusual amount of grain spilled?

A. Yes, there was. One of the boys on this rough road had his endgate jiggle loose on that

(Testimony of Clay Barr.)

rough road and it slid out the back end of the truck.

Q. About how much was that, do you know?

A. Oh, probably a quarter of a load or a third of a load; something like that. [200]

Q. What would that be in bushels or pounds?

A. Oh, I would say a couple of tons of barley or oats.

Q. Over what distance along the road did this accident happen?

A. Oh, of course, when it first jiggled loose it come out there pretty thick, and the further along you would go, why, the lighter it would get. But it run for a couple of miles.

Q. Aside from that one occasion was there any unusual amount of grain spilled along the road?

A. No. No, there wasn't any.

Q. There has been some reference made here to putting tarps or covers over the tops of the trucks. Were there any such covers available at the ranch?

A. There wasn't any tarps on the ranch.

Q. From what you have been able to find out, had there ever been any tarps used in hauling grain there?

A. No, they are very rarely ever used, especially on a short haul like that over rough roads where you can't get up speed, you know. The only danger of ever losing any grain out of a truck, you know, is if you get out on an oiled highway and get a lot of speed, and the wind will whip it out. On a rough

(Testimony of Clay Barr.)

road you can't get up enough speed for the wind to affect it.

Q. What arrangements did you make for taking care of the harvest crew during the harvest?

A. They had a cook house there which I had permission to use.

Q. By the way, was Bud Stevenson still living on the place there with his family?

A. Yes, living in the main living quarters, and I think at that time he boarded there through the cook house.

Q. Where did you live then during the harvest?

A. I was in the bunk house.

Q. Was your own family still up in Oregon?

A. Oh, yes. There was no place down there for them.

Q. What arrangements did you make for the crew?

A. I went up and got my mother to come down and take over the cooking operation for the harvest. She had had lots of experience with crews, and was the best I knew of anyplace in the country to have.

Q. During the harvesting on the Meiss Ranch were you there all the time or were you away part of the time?

A. I was there—I left once, when I went back up into Northern Oregon and got a beef—meat to eat. I went up one evening and come back the next morning. I was there all the time until they moved into the weed patch.

(Testimony of Clay Barr.)

Q. By that time the harvest was all over?

A. All the grain had been gotten, practically.

Q. Now when you left there after the harvesting was all done except the weed patch, where did you go and how long were you gone then? [202]

A. I went up to the ranch in Northern Oregon, and outside of a trip or two back I wasn't back there any more.

Q. About what date was it that you left the Meiss Ranch then to go back to Oregon? That is, when was the bulk of the harvesting completed, all but the weed patch?

A. Around the 5th, I would make a guess. That would be getting within two or three days of it.

Q. Of October? A. Of October.

Q. Then when did you move out completely from the ranch? A. On the 19th.

Q. The 19th of October?

A. October 19th.

Q. What arrangement was made for the sale of the crop, and who made it?

A. I contacted Mr. Herman to start the negotiations of it there, telling him what it took in order to handle the crop; that it might be awful nice to have the crop sold so you could load it on out on the boxcars, because there wasn't any elevators within a long distance, any public elevators. And he contacted Mr. Herman—or Mr. Tonkoff, I mean.

Q. Who made the arrangements for the sale of the crop?

(Testimony of Clay Barr.)

A. Mr. Tonkoff allowed Mr. Welch to sell the grain, I guess.

Q. Did you have anything to do with the sale of the crop at all yourself? [203]

A. No.

Q. There was a document produced here, a copy of a contract with—I think it is on a form of the Tulelake Grain Company, and apparently with Kerr-Gifford Company. A. Yes.

Q. Who entered into that contract?

A. Mr. Bud Stevenson signed for the landlord's share, and Mr. Welch signed for Mr. Tonkoff and Herman's interest.

Q. Did anybody present any contract to you for signature on the crop at all? A. No.

Q. Were you consulted at all about the sale of the crop once you had asked them to get started on it?

A. No. I started it, as I say, and I wasn't consulted about it. It actually wasn't any of my business, I guess. It was their crop.

Q. Did you ever receive a settlement sheet from Kerr-Gifford or anybody else up until here in court? A. No.

Q. Showing the accounting for the sale?

A. No, I have never saw one until I saw it laying on the table here yesterday.

Mr. Kester: There has been some talk here about the settlement of this lawsuit up in Spokane. For the record, your Honor, in going into this subject I do so with the reservation that I feel it is

(Testimony of Clay Barr.)

entirely irrelevant. But since it has been gone into we would like to inquire into it without waiving that position.

Q. What were the circumstances surrounding the settlement of that lawsuit?

A. Pertaining to what things, particularly?

Q. Without going into the merits or what the lawsuit was about, how did the suggestion come up as to a settlement?

A. That was my suggestion.

Q. Would you just explain what occurred there at that time.

A. I suggested it to Mr. Herman, who was my attorney at that time, and told him that I would give him my interest in this crop with the harvesting expenses back to take care of it.

Q. Now did you make any proposal in dollars as to what you would offer in the way of a settlement?

A. No. I was offering him the crop—period. That was the way I started it.

Q. Did you know at that time what the crop would yield?

A. Oh, no. You wouldn't have any idea.

Q. This was on what date, approximately?

A. June 10th. It had just been seeded, just finished seeding the day before, I think.

Q. The day before? [205]

A. Yes. It might have been two days.

Q. In other words, you came up to Spokane

(Testimony of Clay Barr.)

for that lawsuit right after the finishing of the seeding?

A. Yes. Well, they had a day or so after I left down there to finish.

Q. In other words, you left just before it was fully seeded?

A. Just before it was finished, yes.

Q. So at that time it wasn't even up in portions of the ranch?

A. Yes, there was a lot of it wasn't even up.

Q. Now at the time you offered to let them have your interest in the crop in settlement of that case did you make any estimate of what the crop would be worth? A. No.

Q. Somebody mentioned here that you had quoted a figure of a quarter of a million to \$300,000. Did you ever give any such estimate of the crop?

A. Why, that is impossible to quote. The largest crop that was ever raised on the place, Mr. Stevenson was saying there and putting a price on that year, only come to half of that.

Q. Did you make any such estimate or use those figures at all?

A. No, I wasn't using any figures. It was my intention just to say the crop, period, and no figures. That is the way I started it. [206]

Q. Did you ever have any direct conversation with Mr. Tonkoff or Mr. Welch or any of the adversaries?

A. No. Mr. Herman made the settlement.

(Testimony of Clay Barr.)

Q. After you told him that they could have your half-interest in the crop, then what was the next thing you knew about the settlement negotiations?

A. Mr. Herman went down to their hotel and made the arrangements, and through so many of them that was into it, it was my understanding they all started dividing dollars out of it, and they come back with the dollar figure that was given to me. Mr. Herman come back, and that was the first figures that was ever mentioned. Up to that point I started out with just the crop. Who made the different divisions, and so on, I wouldn't have the slightest idea.

Q. Do you know who arrived at this total of \$72,500 for all of these interests? Do you know where that figure came from?

A. I don't have the slightest idea who arrived at that.

Q. Did you have any direct conversation with Mr. Tonkoff at all about the settlement?

A. Not about the settlement. The only conversation I had with him was over at the courthouse after they had come back and—I don't know what you would call it, but they were suing the real estate man as well as myself, and I felt that he ought to stand a portion of this if there was going to be any settlement. And I talked to Mr. Tonkoff about his portion he should pay back to me, the real estate [207] man.

Q. Did you have any discussion with Tonkoff

(Testimony of Clay Barr.)

about the settlement between the two of you?

A. No, no. That was all settled at the time that Mr. Herman came back from his hotel. That was all settled there.

Q. Did you tell Mr. Tonkoff or anybody on the other side how many acres of grain had been seeded?

A. I was making an estimate on the acreage there was there.

Q. What did you estimate on that? How did you arrive at it?

A. My arrival at it, which was an estimate—and, as far as I know, the acreages on the ranch are still just estimates—was that I was informed there that there was approximately 3300 acres of total cultivated land out there and there was 200 acres out for potatoes. That would cut it to 3100. And then I estimated the ground that was plowed up. There was a strip along the north side, and there was a little piece over here on the east side, and at that time there was a piece over here on the dobe ground. That was purely my estimation of it, just looking at it and making a guess how much ground that was. I thought there was approximately 150 acres out there, so I called it 200. That would cut it down to 2900. Then I allowed 100 acres for good measure and quoted approximately 2800. That was the way I arrived at it.

Q. 2800 acres? A. Yes. [208]

Q. Do you know or does anybody know, in fact,

(Testimony of Clay Barr.)

how many measured acres there were in grain and the various crops?

A. Not to my knowledge, no.

Q. After the settlement of the Spokane lawsuit your father purchased the interest of Horton Herman. Did you know about that at the time?

A. Not until after it was purchased.

Q. Did your father consult with you about buying that at all?

A. Not until he had already purchased his interest of it.

Q. Now subsequently, on the 12th of October, I believe you made this assignment to Mr. Kirschmer. Would you explain the circumstances surrounding that.

A. I had purchased a piece of property in Colorado in which I owed a debt. It was an undivided half-interest in the property and also in the debt. We owed approximately \$100,000, the two of us, which was \$50,000 apiece, payable at so much a year. That came along about the first of March or the last few days of February every year. And I asked him if he would be interested in taking this \$15,000 payment that I was supposed to get in lieu of the annual payment on that debt, and he agreed that he would. So I assigned it to him.

Q. You made an assignment, and I believe a copy of it is attached to Kirschmer's deposition, which we will offer in due course. Since the making of that assignment to Kirschmer [209] what is the situation between you and him on that debt?

(Testimony of Clay Barr.)

A. Of course, the money was not paid to him, as I was expecting it to be, and he was expecting it, so when the payment date came along I had to make the minimum payment just the same, my share of it.

Q. Do you still owe money to Kirschmer on that? A. Yes.

Q. How much?

A. A little over \$38,000.

Q. That is on your \$50,000?

A. That is my interest of it.

Q. Is this assignment to Kirschmer still outstanding? A. Yes.

Q. Now you put in a claim here to that \$15,000 on behalf of Mr. Kirschmer, and if you collect that as a result of this lawsuit do you understand that that goes to Mr. Kirschmer?

A. It is still his money, yes.

Q. Now, referring to the ranch as a whole, was there any area of the ranch where there was any substantial amount of weeds except this weed patch that has been referred to in the southeast part?

A. No, there wasn't—the only weeds there was at all on the ranch outside of what we call the weed patch we sprayed, which was a very minimum amount.

Q. These weeds that were in the weed patch, was there any [210] time when in your judgment as a farmer you could have sprayed for those weeds without damage to the grain?

A. I was watching that very close, and as that

(Testimony of Clay Barr.)

crop came along in that weed patch there—as Mr. Liston testified there yesterday—the weeds started out and when they come up they come up right along with the grain, and they was ahead of the grain at all times clear through until the harvest. The grain was in such a sickened condition, the weeds being ahead, I don't think there was a time that that grain could have been sprayed successfully without killing out the grain and still get the weeds.

Q. Referring to the water situation, was there any part of the ranch aside from this dobe ground and the strip that you have mentioned along the west side of the potato field, besides those two places was there any place where any additional moisture would have made any difference in the grain crop?

A. No. Your dobe ground and that strip along the west side there was the only part in question at all. The rest of it was very plain to see—it was recommended to me, “You are better off to keep it away.”

Q. I believe you have already described the efforts you made to put water on the dobe ground and that strip along the west side.

A. Yes, there was efforts made and we were advised against [211] it; that it was doing more harm than good under those conditions.

Q. There has been reference here or an allegation that you plowed under 120 acres of oats. What

(Testimony of Clay Barr.)

was the reason for plowing under any grain that you plowed under?

A. Over in the weed patch the grain was so thin and the weeds was so bad there wasn't a chance of getting a kernel out of it before they got too big and clear out of control, and I had them go in there and plow that down to keep down the weed seeds for the next year.

Q. In your judgment was that a farmerlike thing to do?

A. Definitely. The only mistake I made, if it would have been my crop, is I didn't do enough of it.

Q. Were any of the combines or harvesting machines operated at such a fast speed that grain was wasted by reason of the speed of the operation?

A. Not in my opinion, no. I was out there all the time and I was with them constantly there, and in my opinion there wasn't.

Q. Were the trucks that were used to carry the grain in any way inadequate or improper for hauling grain?

A. No. As I say, the trucks that was on the place was good equipment, and the trucks we took down there was also good equipment. It was first-class machinery for hauling grain.

Q. Standard grain bodies?

A. Yes, standard grain equipment, used everywhere. [212]

Mr. Kester: I think that is all.

(Testimony of Clay Barr.)

Cross Examination

By Mr. Tonkoff:

Q. Mr. Barr, you testified, I believe, that you were on this ranch in 1948 and again in 1951.

A. Yes.

Q. Now you say a real estate man took you down to the ranch. Was that for the purpose of selling it to you or what?

A. No, not particularly to sell it to me. I did take a look at another piece of property, and he was trying to sell this ranch, and we did go over it, yes. I was interested in it, but not seriously.

Q. You were operating a great amount of acreage on other wheat ranches? A. One.

Q. In '53 and prior thereto?

A. All I was operating was the place here in Northern Oregon.

Q. How much did that amount to? How many acres?

A. There is 2300 acres in that place.

Q. You had been farming all your life. You are a good farmer, aren't you?

A. I consider myself one of the best.

Q. So you found out about this ranch and its reputation for [213] production, did you, as early as 1940?

A. Well, you go talking about reputation. I found out about the ranch. It had been for sale off and on there for several years. I don't know how serious they was considering it.

Q. You knew the capabilities as far as produc-

(Testimony of Clay Barr.)

tion was concerned? You were advised that in 1947 they took off an \$800,000 crop, weren't you?

A. I would question the amount of dollars you are speaking of there, but that was the biggest year the ranch ever took off. Mr. Stevenson told me so.

Q. He told you he got over \$800,000?

A. I don't think he quoted any dollars. He said it was the largest crop the ranch ever took off.

Q. At any rate, on May 5th you went down and you visited the ranch, and on the 7th you entered into this agreement which is Exhibit 14, did you not, the lease for the ranch?

A. The lease for the ranch was on the 7th. It was dated there, I think you will find.

Q. And among other things, the lease says that you as lessee agree to operate and farm said ranch diligently and to the fullest extent practicable and in a good and farmerlike manner; isn't that right?

A. I don't know the wording, but you are reading it there. If that is what it says—

Q. Then on the 11th of May you said you took over the ranch? [214]

A. Yes, I personally went down and I took over the expenses as of the date of that, and I had to kick back a little on the expense they was out until I was able to get down there.

Q. You were down there the 7th, weren't you?

A. I was down there the day that the lease was signed.

Q. Then on about the 5th of June you left the ranch, did you not?

(Testimony of Clay Barr.)

A. The 5th of June, yes, approximately the 5th of June.

Q. You went to Spokane to defend the fraud case that was brought against you; isn't that right?

A. I had a legal action in Spokane.

Q. A legal action. It was a fraud case, wasn't it?

A. Yes.

Q. After you listened to the testimony for two days you decided to settle; is that right?

A. It went on for one or two days there when we entered into a settlement agreement.

Q. You told Mr. Herman to propose a settlement; isn't that right? A. Yes.

Q. And at that time, Mr. Barr, did you not show us this lease that you had on this ranch in California?

A. I think I gave it to him. He probably showed it to you.

Q. For the purpose of showing it to myself and Mr. Welch and everybody concerned; isn't that right? [215] A. I imagine, yes.

Q. You say you made no representations whatever as to the amount of the crop?

A. Dollar figures, no.

Q. Did you not advise us that that was a good crop and was growing and was coming along very well? A. No, I didn't.

Q. You didn't say anything like that?

A. No. No, I never made any representations. I will tell you why I didn't.

Q. I don't care why you didn't.

(Testimony of Clay Barr.)

A. I am going to tell you why I didn't. Mr. Welch, it was my understanding, had been in that country personally and knew the ranch, probably knew it as well as anybody, knew it as well as I did, and he knew the place and you could take his representations of what he thought it was.

Q. You know very well, don't you, that Mr. Welch called the ranch before he gave you any answer?

A. Mr. Herman told me that—I don't know whether he told me that Mr. Welch called, but he told me that you had called down, I think.

Q. To find out the condition of the crop; is that right?

A. Well, I presume that is what you was calling for, to see whether it was all in that I had represented, and so on.

Q. Just a day or so before you got to Spokane, Mr. Barr, [216] some of your crop was up as high as eight inches; isn't that right?

A. Oh, Lord, no.

Q. It was not? A. Lord, no.

Q. Was any of the crop above the ground?

A. Yes. There was approximately half of it—after all, they had finished seeding there after I left down there. Part of that Bud had seeded was through the ground; probably the first half of what he had seeded was peeking through the ground. There was nothing up in the air.

Q. None of the crop was up above the ground?

A. Not to any height at all. You take grain,

(Testimony of Clay Barr.)

when it comes up it will shoot a spray maybe two to three inches straight up, and then it will sit there a couple of weeks and stool out. But it will never get that until two or three weeks afterwards. The stool makes a base for the grain.

Q. When you took over in May eleven or twelve hundred acres had been planted, hadn't they?

A. Yes.

Q. You still say there wasn't any crop above the ground?

A. I said there was crop above the ground, yes.

Q. To the extent of six or eight inches?

A. Oh, not any six or eight inches. There was nothing up like that. [217]

Q. Now did you make any representations as to the amount of the plantings down on the ranch to us in Spokane? A. In acreage?

A. Yes.

A. I made my representations to Mr. Herman on the acreage.

Q. To convey to us? A. To convey to you.

Q. Did you ever have any conversation with me at all during this settlement, Mr. Barr?

A. Just over in the courthouse in connection with the real estate man's interest, on what I might get from him for a rebate if I assigned this crop to you.

Q. Do you mean to testify I was representing the real estate man that was connected with you—

A. No, you came to me and asked me whether

(Testimony of Clay Barr.)

he was going to stand part of it, and I told you that he didn't want to.

Q. What concern was that of mine?

A. And you said, "Well, I will tell you what I will do." You says, "I will drop him out of this case and we will go ahead and sue against the real estate man alone, and whatever I get you can have it back. If I get any, you can have it." That was your words.

Q. What concern was it of mine whether or not the real estate man contributed?

A. Up to that point I wouldn't agree to give it unless he [218] would stand a share. You was wanting it, evidently.

Q. Did you make any representations as to the quality of the crops that were growing down there? You say you made a representation as to the quantity.

A. Just the acreage.

Q. Did we talk about what they might bring?

A. Not in front of me. I never talked on it to you.

Q. Did you tell Mr. Herman what they might bring?

A. No. The dollar end of this figure was you guys entirely. I was giving the crop. I wasn't caring what was decided on that it was worth.

Q. Now, you read this declaration, did you not?

A. Yes.

Q. Let me recall this provision, which says you and your wife "herein agree upon the harvest of said assigned crop to deposit the same at their ex-

(Testimony of Clay Barr.)

pense in a warehouse or warehouses and to have warehouse receipts therefor issued in the names of the assignees." That is Herman and myself.

A. Yes.

Q. "It is agreed that at the earliest practical date, not in any event to be later than November 15, 1953, said crop to be sold up to the extent of \$72,500 net to the assignees; and the assignees"—that is Herman and myself—"shall upon the receipt of said sum endorse and deliver over to the assignors all warehouse receipts, if any, representing any [219] of said crops not so sold."

Did you not tell us that these crops would bring over the sum of \$72,500? A. No.

Q. And that after we were paid you expected to get some back?

A. No. I knew it wouldn't make that. That is the reason I wasn't interested in what was over it.

Q. You knew at that time that we wouldn't get our \$72,500 which you agreed to settle for?

A. You can't say that you know anything when you are talking about a crop that is coming through the ground.

Q. Just a moment. I thought you said a month ago you knew it wouldn't bring \$72,500?

A. It was my estimation. That was a wrong statement.

Q. A wrong statement?

A. It was my estimation at that time that it wouldn't—

Q. That it wouldn't be—

(Testimony of Clay Barr.)

A. That it wouldn't get much over that.

Q. And yet you were willing to settle this case for the sum of \$72,500?

A. No. I was willing to settle the case for my interest in the crop.

Q. Why did you expect to get back the overage?

A. I didn't say I was expecting to get back any overage.

Q. You insisted on that provision, didn't you?

A. No.

Q. Didn't you have your tax man in Mr. Herman's office to consider your Internal Revenue tax in view of drawing this agreement?

A. Yes. That was just merely my standing tax-wise on the amount of money that you did get.

Q. And at the time you and I were there didn't he advise you that this would be a deductible item if you arranged the provisions and covenants of this agreement so that you could deduct that \$72,500?

A. He didn't say that I could deduct any \$72,500. He said I could deduct whatever you got from the net; that it was an expense from the money representing my income; that it would represent my expense, whatever it might be.

Q. Didn't he further tell you in my presence and in the presence of Herman that all sums you received above the \$72,500 would be income to you?

A. If I got it.

Q. And that your income would start after you paid us our \$72,500?

A. Yes, if I got it.

(Testimony of Clay Barr.)

Q. Didn't you also represent to me in front of Ed Welch that all this ranch had to do was bring less than \$100 an acre and it would be over a quarter of a million dollars, Mr. Barr? [221]

A. I never made any representation to you.

Q. You never made any representation to me?

A. That was all settled ahead of time. Before that ever come up you agreed to take it, and it ended at that point. The only thing that was held out on that settlement at all, you agreed to take the crop on this basis, and it was your figures that come back to me quoting dollars. The only provision I asked, I tried to get some rebate from the real estate man and find out from my tax man whether this would be a free cost to me.

Q. You were concerned about your income tax because you were going to make around a quarter of a million dollars that year, weren't you?

A. No. I was interested in the amount that you got and whether I would have to pay straight income on that and then wouldn't be able to deduct it off as a deduction.

Q. Mr. Barr, here in another place you and your wife agree as assignors "to farm said lands in a good and farmerlike fashion and in accordance with the terms of the aforementioned lease"—which has reference to the lease that you had with Hofues—

A. Yes.

Q. —"it being understood and agreed that the assignors are not guaranteeing any particular yield, and shall not be liable for crop failure due

(Testimony of Clay Barr.)

to any cause beyond the control [222] of the assignors."

Now that same provision was also put into the declaration, wasn't it, as well as the assignment?

A. I don't recall. If you read it out of there, I presume it is in there.

Q. Here is another provision: "It is understood and agreed that in the event the net proceeds of the sale of said crop referred to in the assignment that are received by the assignees does not equal \$72,500, then such lesser amount as is received by said assignees, who are the trustees in this Declaration of Trust, shall be divided and paid to the above-named parties on a prorata basis in proportion that the amount each would receive if the net proceeds of sale equal \$72,500 bears to the amount of the actual net proceeds received."

Didn't you expect, Mr. Barr, that if this crop had brought a sum above \$72,500 to get the overage?

A. No. That was my request for that provision in there for my protection, when you come back and put a dollar figure to it instead of just taking the crop. I wanted a provision in there that you would take—as to what was to happen when it come under that.

Q. The question is, Mr. Barr, did you not expect to get the overage, or any sum in excess of \$72,500?

A. I would have got it, yes, under that agreement if there [223] would have been an overage.

Q. In any event, your position is now if you

(Testimony of Clay Barr.)

gave us the crop and if it didn't bring \$72,500 that would be our bad luck; is that right? If it brought over the sum of \$72,500 you wanted that?

A. I would have gotten it, yes.

Q. Now you went back to Spokane on June 5th, did you not?

A. At the time I went up there to prepare for this trial, yes.

Q. We settled this case on the 10th, the day we executed this assignment and Declaration of Trust; is that right? A. Yes.

Q. You and your wife signed it?

A. That is the date of it, I think.

Q. Did you come back after that to the ranch here? A. Within a couple of days.

Q. How long did you stay there?

A. I was there until the 20th.

Q. Then you went back to harvest your own crop up North?

A. To prepare for harvest at that time.

Q. You never then returned until I took you down to the ranch on July 2nd?

A. No, I was down there around the 1st with the spray man. You was down there the 3rd, I believe, wasn't it?

Q. Mr. Barr, you rode down with me and Mr. Welch, didn't [224] you? A. Yes.

Q. And we talked to you for two or three days before that on your ranch at Mikkalo, and picked you up at Arlington? A. Yes.

(Testimony of Clay Barr.)

Q. Isn't it a fact you had not been down there since you finished planting?

A. No, I was down there one trip between that.

Q. You talked to the spray man on July 2nd, according to the spray man's testimony. Was he wrong on the time?

A. He said approximately July 2nd, and I will go along with him. I don't know the exact dates.

Q. Then the next time you went down there was at harvest time; isn't that right?

A. Oh, Lord, no. After I went down there with you I brought Perry Morter down there between the 12th and the 15th.

Q. That is right. You went down July 15th.

A. Yes.

Q. Then after that you were down there for the harvest?

A. No, I was down there about once a week all summer, I was down there.

Q. If you were down there once a week, Mr. Barr, why was it necessary for you to go down with Welch and myself to ascertain whether or not the crops were not being irrigated?

A. I had been satisfied myself. I was wanting for you to [225] see the condition under which you had to irrigate and see that land, to show to you that you couldn't expect a big irrigation job.

Q. When you got down to Klamath Falls you met somebody from Texas who was negotiating to purchase your lease; isn't that right?

A. No. He was the landlord on the place I was

(Testimony of Clay Barr.)

farming. He was up there and he was going home, and I made arrangements to ride out with him before we ever went down. You had called and said you was going to be there a certain hour, and he was driving through, and he got in his car and drove down. When you came along we flew down and I met him. I had this arrangement before we left Arlington.

Q. Didn't you make a statement to me you were going to sell that lease for \$50,000 to him, and we were talking about how you were going to pay off this obligation?

A. No, I had no intention of paying off that obligation.

Q. He went to the ranch, didn't he?

A. Yes.

Q. Did you not show him the land?

A. We went all over the ranch the evening we got there. When you went out with Bud and Welch and went over the place, I went over the place with him.

Q. What obligation did you say you had no intention of paying off? [226]

A. I had no intention, I say, of paying that \$72,500 equity which you were claiming in that crop.

Q. I don't quite understand. You say you had no intention of paying this?

A. Of paying it out ahead of the harvest. You was to get the crop. I was still maintaining you

(Testimony of Clay Barr.)

were to get the crop. He didn't want to buy your interest in the crop.

Q. At any rate, you went over the ranch with this gentleman that took us down, and Welch and Bud and I went over the ranch together, didn't we?

A. Yes, you went over the ranch.

Q. The next morning I called your attention to the fact that the wheat was drying up and where it was dry it was small and was stunted, didn't we?

A. Yes.

Q. And you told me faithfully that you would come in the following Monday with a crew and start irrigating, didn't you?

A. I did not. I quoted yesterday the exact words that was said between you and I.

Q. When I complained to you about the irrigation you said, "Why don't you pay me off and take over and pay me my expenses?"

A. I says, "If you and Welch and the rest of them are not satisfied, why don't you give me the expenses I have been out and," I says, "you take it over and run it."

Q. What prompted you to say that? Was I making a complaint to you about anything? [227]

A. You was wanting me to irrigate.

Q. I was wanting you to irrigate?

A. Yes.

Q. Because it was dry; isn't that right?

A. Yes, there was dryness up there on that dobe ground.

Q. Your testimony is you didn't promise to come

(Testimony of Clay Barr.)

out the following Monday and start irrigating?

A. I told you that I would look into it and come down with another man and see how it would work out, but I wouldn't guarantee I was going to use any water.

Q. You never showed up for two weeks or three, did you?

A. I came down there between the 12th and the 15th.

Q. I thought you said that you came down there about the 15th, after we left there July 2nd?

A. How is that?

Q. I thought you said that you didn't return to the ranch until the 15th or 20th of July after you left there.

A. I said the 12th to the 15th; something like that.

Q. At any rate, you let it go by for two weeks without doing anything about it? Irrigation I am talking about.

A. If you want to keep it to the day, you could figure from the 3rd—no, the 4th. I went back on the 4th of July there and come back between the 12th and the 15th. I can't name that date.

Q. Isn't it a fact that some of those crops were then being [228] dwarfed in comparison to crops around the ditch banks where they had plenty of water?

A. There was a shortage up on that dobe ground.

Q. Now, Mr. Barr, you knew, did you not, that

(Testimony of Clay Barr.)

litigation was going to arise out of this situation down here as early as September 15th?

A. September 15th?

Q. Yes. A. How did I know it?

Q. Because you had a conversation with Mr. Stevenson, at which time you told him if he would keep out of the litigation between Welch and yourself that you would see to it he got a \$15,000 commission for the sale of the land.

A. That is your pipe dream there. Nobody had informed me—you hadn't contacted me in any way, shape or form, and I had no positive idea that there was going to be any litigation because we didn't know what the crop was going to be.

Q. Why did you sell your interest to Kirschmer on October 19th or 12th?

A. The main reason was my obligations was pretty great at that time, and you tied up my \$15,000 here, and there was a question whether I was going to have money enough to properly run the ranch.

Q. Mr. Barr, nobody had tied up this \$15,000 until the following January. It wasn't tied up when you assigned it, was it? [229]

A. Kerr-Gifford wouldn't pay it out at your request, or something. I don't know what that was all about.

Q. Mr. Kirschmer never asked you for an assignment then?

A. No. I asked him to take care of part of my obligations so it would relieve me of having to pay

(Testimony of Clay Barr.)

the money. It is all six of one and half a dozen of the other.

Q. Neither Mr. Kirschmer nor Mr. Hofues were satisfied with your operation of the ranch, were they? A. Yes, I think they were.

Q. You say they were?

A. As far as I know, with my operation of it, yes. I think they were.

Q. You heard them testify in Amarillo and in Las Vegas that they were not, didn't you, when we took their depositions?

A. They were testifying to the condition of the ranch, and they was also testifying there that the reason I was called in there was on account of poor operation. I couldn't help that part.

Q. Mr. Barr, you say you are one of the best farmers, and you mean to tell this Court that you can operate a ranch in the northern part of the state, four or five hundred miles away, by going there about four or five times during the summer?

A. That wasn't my intention when I took this lease.

Q. But that is what happened, isn't it? [230]

A. That was because I couldn't get complete possession to work in there and get down there at all the time.

Q. Is that why you neglected the property?

A. The property wasn't neglected.

Q. Now Stevenson was working for you, wasn't he?

A. No. I was subject to Stevenson's contract. I

(Testimony of Clay Barr.)

asked for him to be relieved of the ranch, but he had a contract and they couldn't relieve him.

Q. You signed this lease, didn't you?

A. Yes, I had signed the lease.

Q. There is nothing in this lease which says you are subject to Stevenson or anybody else, is there?

A. I believe if you will read it there it will quote that I am subject to leases, and names part of them, or something.

Q. You are subject, Mr. Barr, to James Noakes and Mary Noakes—that is the daughter of Mr. Stevenson—and that is the only one you are subject to. I mean that property is excluded from the ranch; isn't that right?

A. Yes. It is over here on the far side. Read the rest of the subjects, though.

Q. All right. "For and in consideration of the covenants and agreements of lessees as hereinafter stated and upon the terms and conditions hereinafter stated, lessors do hereby lease and let unto lessees all of that certain property located in Siskiyou County, California, and known as the [231] Meiss Ranch, subject to leases of portions of said ranch heretofore made with James H. Noakes and Mary E. Noakes and with J. C. Stevenson and Juanita Stevenson and other leases covering approximately 240 acres of potato ground."

A. Yes.

Q. Otherwise you had full control. And the J. C.

(Testimony of Clay Barr.)

Stevenson referred to is the father, J. C. Stevenson, Sr., isn't that right? A. Yes.

Q. And Bud Stevenson, Jr., hadn't any lease on this property, did he?

A. No, but he had a working agreement on the property, a manager's agreement, or something like that.

Q. You agreed to farm it not only in this lease but also in the assignment that you gave?

A. Yes.

Q. Now, at the time you arrived there on the ranch the Noakes' crops were already harvested and forgotten about, weren't they?

A. They was still harvesting part of their crops after I pulled out and was gone on the 19th of October.

Q. After you pulled out on the 19th of October you say they were still harvesting after you left down there?

A. Yes. They still had some of it to harvest after I pulled out and had left.

Q. Now you are familiar with the fact it is necessary to [232] spray to preserve the wheat when weeds get in, aren't you?

A. Yes, under certain conditions.

Q. You mean to tell us that you used every precaution to prevent these weeds from getting in?

A. To my knowledge I did what I thought was the right maneuver there as far as weeds was concerned.

Q. You know, Mr. Barr, if you allow those

(Testimony of Clay Barr.)

weeds to get up past the grain before you start spraying—

A. They was always ahead of the grain on that field.

Q. You are supposed to spray them when they have two leaves on them, aren't you?

A. The weeds?

Q. Yes.

A. The smaller you can spray the weeds, the better, the easier it is to kill them.

Q. When you called in the spray man in July they were way above the grain; you couldn't see any grain, could you?

A. They was always above the grain there.

Q. At any rate, that wasn't the proper time to spray them, on July 2nd, was it?

A. If I was going to spray them at all, in my opinion that was the only time we stood a chance of spraying them without killing the grain.

Q. Well, the weeds killed the grain eventually, didn't they?

A. They took over—a part of it we was unable to harvest [233] entirely, yes.

Q. Now, Mr. Barr, there was only one bit of irrigation done that entire year and you stopped that; isn't that right?

A. How did you word that?

Q. I said there was only one bit of irrigation on that entire ranch during the year 1953, and when you found out it was being irrigated, the property was being irrigated, you stopped it?

(Testimony of Clay Barr.)

A. I stopped the irrigation. What irrigation was being done I stopped.

Q. You didn't do any irrigating at all?

A. Yes, we experimented with it.

Q. You know you can't grow crops down there without irrigation, don't you?

A. That is a questionable item. I wouldn't say no to that.

Q. You know you can't grow crops unless they are sprayed for weeds if they have weeds; isn't that right?

A. If the weeds is a serious condition it is a right thing to do to spray them if you can do it without harming the grain.

Q. Now you mentioned yesterday that on the west side where the dobe ground is there was some oats there that had fallen over from the year before.

A. East of the dobe ground, down in that bottomland down here. [234]

Q. I believe you said that they were what—two or three feet high?

A. I don't know. They was all tromped down there by the sheep. There had been sheep there and it was matted down, you know, all through the fall and early winter there.

Q. At any rate, those oats were a lot higher than the ones you grew in 1953, weren't they, in the same place?

A. I wouldn't say that they were.

(Testimony of Clay Barr.)

Q. Did you see the movies yesterday where they were up eight, ten to twelve inches high?

A. Where?

Q. In the pictures that we showed yesterday.

A. Yes, but in what part?

Q. The same part we are talking about, where you say——

A. Those oats down in that field where you are speaking of was good oats. The only shortage of oats, any short crops, was up here on this dobe ground there.

Q. Who drew the map, Exhibit 3, that is on the board there? A. Well, which one is 3?

Q. That one below, the colored one.

A. The colored one?

Q. Yes.

A. That was taken—it is my information there that the Government men took that.

Q. I said who drew it, who painted it? [235]

A. I don't know.

Q. You don't know who painted it?

A. I think they did, as far as I know.

Q. Is there any Class 1 land on there?

A. No.

Q. Now would you please take a look at this map that we got from——

A. This is a Government map here.

Q. What?

A. I say, that is a Government-made map there by the Soil Conservation down there. They painted it up and made it, to my knowledge.

(Testimony of Clay Barr.)

Q. Where did you get that map?

A. What?

Q. Where did you get that map?

A. Mr. Kirschmer gave it to me.

Q. Mr. Kirschmer gave it to you?

A. Yes.

Q. You didn't get that from the Government office down there?

A. No. I took it over to have it explained to me, and they admitted that it was their map.

Q. Take a look at Exhibit No. 1, our map that we got from the Government office down there, the land classification office, and tell the Court whether or not the Meiss ranch is not Class 1 land according to the legend on that map. First, [236] Mr. Barr, you show us where the lake is. It is marked "Meiss Lake," isn't it?

A. Yes, here it is marked "Meiss Lake." This map evidently was taken before the ranch was reclaimed. Isn't that right?

Q. Taken when?

A. Before the lake was reclaimed.

Q. It couldn't be, because the Government classified the land, about 90 per cent of it, as Class 1 land.

A. This line right across here, is that in the dike, the old dike that was originally put there?

Q. I don't know. It speaks for itself. It is marked "Lake," isn't it?

A. There is Meiss Lake, and there is the dike. The lake is shown over here.

(Testimony of Clay Barr.)

Q. Immediately west of that lake, isn't that all Class 1 land according to the legend on that map? You will find the legend at the southwest corner. Isn't that right, Mr. Barr?

Mr. Kester: It speaks for itself, whatever it shows.

A. Yes, this territory right in here is considered Class 1, right here.

Mr. Tonkoff: Q. You don't have any Class 1 land on your map, do you? A. No.

Q. You didn't get that map from anybody than Mr. Kirschmer?

A. He gave it to me and I took it over and had it identified [237] from the Government office as their map. They made it up. It is a soil classification from their office, is what he told me.

Q. As I understand it, after July the 15th, from the 12th to the 15th, you again returned to the Meiss ranch on August the 7th with three men, a combine and three extra trucks; is that right?

A. I think it was around the 7th or 8th or 9th.

Q. Was that September or August? I have it marked August. Maybe it was September.

A. No, August. As soon as the harvest was cleaned up here—I finished harvesting here the 7th, and we came down the next day. I think you will find that right, so it would be the 8th, I believe.

Q. You said the 7th. How long did you stay there that time?

A. Well, I was around there the biggest share of the time until the harvest started.